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UNANIMITY OF VERDICTS.—Some very able papers, by Benjamin F. Hall, Esq., are being published in the Albany Law Journal under the title, "Reasons for the Proposed Legislation respecting Verdicts," in which the writer favors the passage of a law, doing away with the requiremeut of unanimity in verdicts. It would seem that, on a question like this, the opinion of that respectable philosopher, Shakespeare, ought to have some weight. He says:

> The jury passing on the prisoner's life
> May in the sworn twelve have a thief or two
> Guiltier than him they try: What's open made to justice,
> That justice seizes? What know the laws,
> That thieves do pass on thieves? 'Tis very frequent,
> The jewel that we find, we stop and take it,
> Because we see it; but what we do not see,
> We tread upon and never think of it.

JUDGE DILLON.—Our readers will be glad to know that Judge Dillon has returned from his trip to Europe in good health. He is now holding court at Des Moines, and will have need of all the strength he has been able to recruit during his summer jaunt; for he finds a great accumulation of work before him. We welcome him back to our columns in an important decision (elsewhere printed), in which he holds that a national bank has power to take a pledge of chattels as security for a loan of money. This opinion exhibits one feature which is a characteristic of Judge Dillon's decisions, and for which the profession can not too much thank him—it is short. The highest point in good writing is to know when one is done—to be able to say what should be said and then quit. To this point Judge Dillon has "filed his mind," and if some other judges, who, in their opinions are in the habit of roaming over all creation, would subject themselves to a like discipline, it would greatly improve their decisions.

THE ALABAMA CONSTITUTIONAL CONVENTION has adjourned after having been in session twenty-seven days. The governor of the state will, by proclamation, fix the day on which the election is to be held to vote upon the question of its ratification. Like the new constitution of Missouri, the instrument which the Alabama convention offer to the people of that state appears to be in the main non-partisan, enlightened and liberal. The general assembly will be deprived of all power to lend the money or credit of the state to any works of internal improvement; also, of the right to authorize suits to be brought against the state in her own courts, the new instrument declaring that the state shall never be made a defendant in any of her courts of law or equity. The power of levying taxes for state purposes is restricted to three-fourths of one per cent. per year. The pay of members of the legislature is to be only four dollars per day. Several useless offices are abolished, and there is a reduction in the salaries of some that are retained. Local interests to be provided for by genera legislation. State and federal elections are separated. There shall be no educational or property qualification for suffrage or office—no restraint on account of color or previous condition. The fact is recognized that "from the Federal Union there can be no secession of any state." Exemptions are left as at present We are not advised whether the reduction of salaries extend to the judicial offices or not. If so, it will prove a most ill-judged measure. The salaries of the judges of all grades in that state are so low that it is only in exceptional cases that first class talent can be obtained for seats on the judicial bench; and we learn that some of the judges of the Supreme Court of that state now talk of resigning on account of the inadequacy of their compensation. A further reduction of judicial salaries can have no other effect than a degradation of the judiciary.

LIABILITY OF A HUSBAND FOR SERVICES OF AN ATTORNEY INCURRED IN DEFENDING DIVORCE SUIT FOR WIFE.—In Porter v. Briggs, 38 Iowa, 166, the Supreme Court of Iowa has ruled that an attorney may maintain an action at law, against a husband for services rendered the wife in a proceeding against her for a divorce on the ground of adultery. Four reasons are given for this ruling: 1. That the husband is liable upon an implied promise to pay for necessaries furnished his wife. 2. That expenses incurred in defending her good name, whether assailed by her husband or by a stranger, are properly classed as necessaries. 3. That the liability of the husband for the necessary expenses of his wife in employing counsel in a divorce proceeding, is uniformily recognized in the Ecclesiastical and Chancery Courts. 4. That since the basis of the claim is an implied promise of the husband to pay for what is necessary for the protection of the wife's interests a a court of law has jurisdiction of the case.

Whilst this conclusion seems to be sanctioned by a just and enlightened view of the marital relation and of the duties of the husband towards the wife, yet it seems to us that the reasons adduced in support of it are highly artificial, if not positively bad. How can it be said that *the law implies a promise* on the part of the husband to pay the wife's lawyer's fees when they are litigating against each other? What is "the law" which makes this implication? Why, it is the court—the judge—guided by rules which have been previously laid down by other courts and judges. And how can the judge *imply* that which is contrary to experience and reason—which he knows does not exist. What judge in this case ever supposed that the husband had *promised* to pay the attorney's fees of his wife, when he was endeavoring to procure a divorce from her on the ground of adultery? No, no; his contention clearly was that she had violated the marital compact in a high point, and that she had consequently absolved him from doing anything more for her. Would it not be better, then, to discard this antiquated fiction of an implied promise, and to tell the plain truth by saying that the law conclusively makes it the duty of the husband to pay for the wife's necessaries, and that the services of an attorney in such a case are necessary.

The conclusion of the Iowa court in this case is supported by Shepperd v. Mackoul, 3 Comp. 326; Morris v. Palmer, 39 N. H. 123; Warren v. Haden, 11 Am. Law Reg. (N. S.) 279; in which cases the services were rendered in cases where the wife had exhibited articles of the peace against her husband;

and also by Brown v. Ackroy 5 E. & B. 819; and it is opposed byJohnson v. Williams, 3 G. Green, 97; Wing v. Hurlbert, 13 Vt. 607; Coffin v. Dunham, 8 Cush. 404; and McCallrough v. Robinson, 2 Ind. 630.

The Iowa court, however, hold that the fact that the husband is liable only for necessaries furnished the wife, will preclude a recovery by more attorneys than are necessary for the protection of her interests.

The New Constitution of Missouri.

One week from to-morrow the people of Missouri vote upon the question of the adoption of the constitution submitted to them by the convention lately in session. We presume that all intelligent voters have by this time made up their minds which way they will vote. After ample time for consideration, the general sentiment of the people seems to favor its adoption. Although the convention was composed almost entirely of members identified with one of the great political parties into which the state is divided, yet the constitution which they have submitted to the people is not in any of its features a partisan instrument, and no party question can possibly be made as to its adoption. As an instance of its entire non-partisan character, we may note that that the word "*white*" which occurred in the Drake constitution, which was the work of the opposite political party, in defining the qualifications of senators and representives, is stricken out in this. We fail, however, to discover in this, the provision of the previous constitution, which we thought a wise one—denying the ballot after the year 1875 to persons who can not read and write.

Whilst we are in favor of the adoption of this instrument as a whole, it contains one feature which we can not pass over without protesting against it, although the question involved is not exactly a legal one. One of the great principles at the foundation of the American Revolution was that there can justly be no taxation without representation. It is also a principle embodied, we suppose, in all our state constitutions, that *taxation* shall be equal. We believe also that the right to vote is, by these constitutions, *equally* secured to all male citizens of a certain age. Put these three things together—an equal right to vote, an equal liability to pay taxes, and the right to an immunity from taxation without representation, and does it not imperatively follow that representation in the legislature should be equal? We think we may safely say that equality of representation is one of the fundamental principles of American government. But how is this equality of representation secured by the proposed instrument? It is true that in the senate representation is made equal; but in the house of representatives it is not so. In that body the present *rotten-borough* system is kept up, as will be seen by § 2 of Art. 4, which reads as follows:

> The house of representatives shall consist of members to be chosen every second year by the qualified voters of the several counties, and apportioned in the following manner: The ratio of representation shall be ascertained at each apportioning session of the general assembly, by dividing the whole number of inhabitants of the state, as ascertained by the last decennial census of the United States, by the number two hundred. Each county having one ratio, or less, shall be entitled to one representative; each county having two and a half times said ratio, shall be entitled to two representatives; each county having four times said ratio, shall be entitled to three representatives, each county having six times said ratio, shall be entitled to four representatives; and so on above that number, giving one additional member for every two and a half additional ratios.

It is seen that this system in a measure disfranchises the large cities and more populous counties. It would be supposed that some cogent reasons would have been adduced in support of a measure apparently so unjust; but the following are all the reasons which the committee of the convention appointed to frame an address to the people present in justification of it:

> Since the organization of the state, each county has been entitled to one representative in the lower branch of the general assembly, without regard to population. To abandon this feature, would incur bitter opposition from many long accustomed to it. To adhere to it, prevents the apportionment of representation strictly according to population, without increasing the number beyond reason. To render satisfaction as far as practicable, the plan of county representation has been adhered to, and as a concession to the more populous counties, they have been allowed twelve more representatives than at present, of which St. Lonis county received three, and the remaining nine are distributed among the next most populous counties, according to population. Thus the advocates of increased representation to the more populous portion of the state, while not obtaining all they desire, receive more members than they have under the present constitution.

In other words, the reason here given is, that if justice were done, the house of representatives would become a body too numerous and too unwieldy. But this is no reason at all; since it would have been entirely feasible to organize certain districts of double or treble constituencies, and to clothe the representatives thereof with two or three votes each. This would be an innovation upon the present system; but it would be reducing the matter to a common business practice, such as obtains in private corporations where each member votes according to the number of his shares of stcock. But in point of fact, such a body as the Missouri house of representatives, if each county were allowed one representative and if representation were equal, would not be an unwieldy body, o r would its number be "beyond reason." The example of the American house of representatives shows that three hundred is not an unwieldy body, and the example of the French assembly shows that it is possible for five hundred men to sit together as one deliberative body.

We happen to know that the real reason for this denial of representation which was urged by the country members of the convention was, that a more numerous body would unnecessarily increase the *expense*. Now let us look at this item of expense. Under the proposed constitution the city of Saint Louis is deprived of more than one-half of her just proportion of representation. But this city, while possessing one-fifth of the population of the state, pays one-half the taxes; at least this last fact has been frequently asserted by the public press, and we have not seen it denied. One man in the rest of the state at large, therefore, pays only one-fourth as much taxes as one man in the city of St. Louis. But the country member says to the city member, "Although you pay four times as much as I do towards defraying the expenses of the state government, yet you shall have but one-half of your just proportion of representation in the house of representatives, because to give you what is justly your due would increase the expense." We humbly suggest that the country member is *estopped*, by reason of the small proportion of this "expense" which he bears, from setting up such an excuse for such a flagrant piece of injustice. The measure itself is essential dishonesty, and the reasons offered in support of it are unmitigated impudence.

The real reason is, that there is a sort of barbaric and tribal jealousy in the country against the city, and the country politi-

cians who now have the balance of power in their hands, intend to maintain it at any sacrifice of principle and at any cost. Nevertheless, as this instrument gives to the large cities and the more populous counties a little more of their due than the former one, it is to their interest that it should be adopted.

Foreign Corporations.

STATE REGULATION—UNFRIENDLY LEGISLATION.

At the recent meeting of the Association of Fire Insurance Agents, which was held at Chicago, a valuable report was submitted by Mr. A. C. Blodget of Philadelphia, chairman of the committee on legislation and taxation, discussing, in the light of the decisions of the courts, the *status* of insurance companies doing business in states other than that of their creation. This report seems to have been written by a lawyer familiar with the adjudications on the subject; and we therefore subjoin those portions of it in which the adjudications are discussed, supposing it will be a matter of interest to our readers:

"In many able papers it is insisted with great zeal, and urged with much apparent reason, that an 'insurance company and every other corporation created by state legislation, and composed of citizens of the state creating it, is a citizen of the state,' within the meaning of the Constitution of the United States, which declares that 'the citizens of each state shall be entitled to all privileges and immunities of the citizens of the several states' (Constitution United States Article 4, Section 2), and that 'Congress has the power to regulate commerce among the several states' (Constitution United States Article 1, Section 8, subd. 4).

"It is true that corporations are held to be so far citizens of the state creating them that they are enabled to sue and be sued (in other states) in the Federal Courts, and a suit against a corporation by its corporate name, is a suit against 'citizens of the state' which created it; the legal and (for the purpose of jurisdiction) conclusive presumption being, that the members of the corporation are citizens of that state, and that no averment or evidence to the contrary is admissible for the purpose of withdrawing the suit from the jurisdiction of a court of the United States. Ohio & Mississippi R. R. Co. v. Wheeler, 1 Black, 286; Cowles v. Mercer County, 7 Wall. 118–121; 6 Blatchford C. C. Rep. 105; 2 Howard, 497; 16 Howard, 314; 20 Howard, 232; 4 Blatchford C. C. 120; Hatch v. Chicago & Rock Island R. R. Co. *et al.* 1st American Corp. Cases, 80; Knox v. Home Insurance Co.; Railway Co. v. Whetton, 25 Wis. 153; 9 Wallace, 159; Paul v. Virginia, 8 Wallace, 187; 13 Wallace, 270–284; 7 Ohio St. 450; 105 Mass. 141; Home Ins. Co. v. Morse *et al.*, 20 Wall. 445. The very inconvenient and narrow doctrine contained in the cases in 3 Cranch, 367; 5 Cranch, 84, and 14 Peters, 60, holding otherwise, was reviewed and overruled in Louisville R. R. Co. v. Litson, 2 Howard, 497. The Act of Congress of 28 Feb., 1839, gave aid to this decision, it being considered, in its language and construction, as an enlargement of the jurisdiction of the Federal Courts. 1 Kent, 12 ed. 347, note b.

"By a careful examination of the authorities cited and of all adjudications touching the question of corporate citizenship, it will be seen that, while the principle is well estahlished that corporations are citizens within the clause and meaning of the constitution extending jurisdiction of the Federal Courts to controversies between citizens of different states, the courts have defined the limits of such citizenship, and to what extent and for what purpose state corporations are recognized as citizens within the intent and meaning of the Constitution and laws of the United States.

"In the case of Hatch v. The Chicago, Rock Island & Pacific R. R. Co. et al., reported 6 Blatchford C. C. 105, the court says: 'It is settled by the decisions of the supreme court that a corporation can have no legal existence out of the bounds of the sovereignty by which it is created; that it exists only in contemplation of law, and by force of that law; that when the law ceases to operate, the corporation can have no existence; and that it can only dwell in the place of its creation.'—See also Bank of Augusta v. Earle, 18 Peters, 512; O. & M. R. R. Co. v. Wheeler, 1 Black, 286; Lafayette Ins. Co. v. French, 18 Howard, 407.

"In Covington Drawbridge Co. v. Shepherd, 20 Howard, 227, Chief Justice Taney uses the following language: 'No one, we presume, ever supposed that the artificial being created by an act of incorporation, could be a citizen of the state in the sense in which that word is used in the constitution of the United States.

"In Paul v. Virginia, after expressing approval of the decisions, that corporations are so far citizens that the federal courts would afford them its protection the same as to natural persons, the court observes that the decisions are confined in express terms to a question of jurisdiction; that the principle had never been carried further; and that it had never been supposed to extend to contracts made by a corporation, especially in another sovereignty from that of its creation. The language of Justice Field, and also the language of Chief Justice Taney (13 Peters, 512), has been invoked to sustain the principle of unlimited legislative power in a state to prescribe terms and conditions upon which foreign insurance companies may legally transact business therein, or to exclude such insurance companies or other corporations absolutely from the right to transact business in its jurisdiction, and that the right to impose such conditions follows as a necessary consequence to exclude altogether; and it was so held by Chief Justice Waite in his dissenting opinion in the case of Home Insurance Company v. Morse *et al.*, relying upon the authority of Paul v. Virginia, 8 Wall. 181; Ducat v. Chicago, 10 Wall. 410, and Bank of Augusta v. Earl, 13 Peters, 586.

"The ruling opinion, however, delivered by Justice Hunt, in Home Insurance Company v. Morse *et al.*, 20 Wall. 445, says—'the court do not consider the question whether a state can entirely exclude such corporations from its limits; nor what reasonable terms they may impose as a condition of their transacting business within the state;' that question did not arise in the case at bar, except incidentally.

"The question under consideration was one of jurisdiction of the federal courts, depending upon whether or not it is within the power of a state to impose terms upon insurance corporations, requiring them as a condition precedent to being licensed, to do business within the state, to 'file in the proper state department, a written agreement that such insurance corporations will not transfer or remove to the federal courts suits commenced against them in the state courts,' and whether such agreement when so made, was a waiver of

their right to remove suits in which they are parties, from the state courts to the United States courts, when authorized to effect such removal by the federal laws; and it was held that 'it was not in the power of any state legislature to, in any degree, limit or restrict the jurisdiction of the federal courts' (20 Wall. 445); such jurisdiction depends upon, and is regulated by the constitution and laws of the United States (13 Wall. 286; 7 Wall. 437; 4 Wall. 411); and that every question involving the right to sue and be sued, or be heard in a federal court, as well as that of its own jurisdiction, must be decided in such court; and the case is conclusive not only that such conditions in state statutes are unconstitutional and void, but that such an agreement filed in compliance therewith is not obligatory, and in no way operates as an estoppel or waiver to the right of a corporation to avail itself at will of the benefits of the United States statutes in all such litiguation. Nevertheless the power of a state to discriminate between its domestic corporations and the corporations of other states desirous of transacting business within its territorial jurisdiction is clearly established, subject only to such limitation to that power as is contained in the federal constitution and laws, and in the constitutional restrictions (if any) of their own state. And the exercise of such power (if within such limitations), is not repugnant to the federal constitution as a discrimination between citizens of the several states. 13 Peters, 586; Paul v. Commonwealth of Virginia, 8 Wall. 187; Ducat v. City of Chicago, 48 Ill. R. 172; affirmed on appeal to U. S. S. C. 10 Wall. 410.

"The principle is well settled, that the power of such discriminating legislation (as is not in conflict with federal laws), is not prohibited to the states, and granted exclusively to Congress, under the power to 'regulate commerce among the several states,' but a careful review of all the decisions, demonstrates clearly that all the later cases carefully avoid establishing the principle that such powers exist with the states otherwise than subordinate to the federal laws as well as the constitution, leaving it an unsettled and open question, whether the power of Congress is restrained by the fundamental law from so legislating as to supersede all such state enactments.

"And we confess, with regret, that the tendency of the age, legislative if not judicial, is a leaning towards elastic constructions of the constitutional restrictions; and the period may not be in the remote future when the time honored principle that 'The powers, not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively,'—(Const. U. S. 10th amendment) shall become obsolete, and its adjudicated construction (1 McLean, 234; 17 Penna. St. R. 119; and in many other cases), shall be overruled or explained away, and the power of Congress be unrestrained, if not unquestioned, to establish a national insurance bureau, and regulate and control by law the insurance business, as well as that of railroads, telegraphs, express lines, and other branches of trade and commercial interests, on the theory that such corporations are auxiliaries and arteries of commerce.

"A portion of the insurance press continues to urge the indisputable fact that Congress has 'the right to regulate commerce among the states,' and insists that insurance business is 'commerce,' within the constitutional meaning of the term, and criticises, with some asperity, the decisions of the courts holding otherwise, and continues the agitation for national insurance laws, a national insurance bureau, and national supervision, but fails to point out the instrumentality by which constitutional and legal obstacles are to be overcome.

"And, as a somewhat extraordinary evidence of the growing tendency upon this subject, we refer to a curious and remarkable expression of sentiment of the House of Representatives in Congress, by a vote on the 9th day of February, 1874, on a resolution declaring 'That, under the provisions of the Constitution regulating commerce among the states, Congress has the power to regulate the business pertaining to railroad corporations.' The vote on the passage of this resolution was 170 ayes, 64 nays. Railroad corporations are creatures of state legislation, like insurance corporations, and if Congress can constitutionally exercise the power to supervise one class of state corporations, it is difficult to conceive why that power can not be extended to the supervision and control of any and all other state corporations. It will be borne in mind, however, that this was but an empty resolution of one branch of Congress, ill considered and powerless for good or evil, other than as an indication of a *drifting* in that direction.

"'The privileges and immunities secured to citizens of each state in the several states,' are those privileges and immunities which are common to the citizens of the several states under the constitution and laws; and special or chartered privileges granted by one state to the citizens thereof, are not by virtue of such corporate citizenship secured to them in other states. Under this provision such special privileges and corporate powers must be enjoyed within the state granting them, unless the assent of other states to their enjoyment therein be given. Paul v. Virginia, 8 Wallace, 168. The case of Paul v. Virginia decided that 'the business of insurance was not commerce,' and that a corporation of one state transacting business through its agencies in another state is not engaged in 'commerce between the states,' that 'such contracts are not inter-state transactions, though the parties may be domiciled in different states,' and that decision was examined and followed in Liverpool Insurance Co. v. The Commonwealth of Massachusetts, 10 Wallace, 566, and commented upon and not disapproved nor overruled by Home Insurance Co. v. Morse *et al.*, 20 Wallace, 445.

"Having no absolute right to transact business in other states, and depending for such right and power to enforce its contracts therein upon the 'comity of states,' it follows, as a legal conclusion, that the comity may be extended and *assent* granted upon such term and conditions as the state may see proper to impose,' not in conflict with the federal laws; and, within such restrictions, they may exclude a foreign corporation from the privilege of transacting business within the state; they may restrict its business to particular localities, or they may exact security by requiring deposits (or otherwise) for the performance of its contracts with their citizens, and impose such taxation as is warranted by their state constitution. Paul v. Virginia, 8 Wallace, 187."

Mr. Blodget concludes by deprecating the views of those who would have Congress attempt to assume an entire supervision of insurance corporations, to the exclusion of the states, but he is willing to trust to the people to repeal such un-

friendly legislation as exists in some states, which must have the effect of increasing the premiums which the citizens of such states must pay for insurance; since every additional burden imposed upon any business must necessarily increase the cost of the commodity which that business produces, unless the cost was previously so great that it could safely submit to a reduction.

Power to Recall and Cancel Land Patent after Transmission to Local Land Office.

THEODORE LEROY v. TOBIAS B. JAMISON, *ET AL.*

United States Circuit Court, District of California, June 23, 1875.

Before Mr. Justice FIELD.

The commissioner of the general land office can not recall or cancel a patent for land, after its transmission to the local land office for delivery to the patentee; since the patent, when the last formalities required by law of the officers of the government have been complied with, is a matter of record, which, so far as the government is concerned, is delivered the same as a deed by grantor to grantee; but if the patentee refuses to receive the patent, because certain necessary acts have not yet been done by the government, the commissioner may recall and cancel it.

Opinion of Mr. Justice FIELD.—This case has been elaborately and ably argued by counsel on both sides, and has been considered by the court with the care which its importance demands. It is an action of ejectment for the possession of certain real property situated in Santa Barbara county. Both parties claim the demanded premises under patents of the United States, issued upon the confirmation of grants of the former Mexican government. The patent under which the plaintiff claims bears date in March, 1870, and the grant upon which it is founded was made in March, 1840. The patent under which the defendants claim bears date in October, 1873, and the grant upon which it rests was issued in December, 1844. The plaintiff, having the earlier patent and the elder grant, is entitled to recover, unless the validity of the patent, or the correctness of the survey of the premises covered by it, is successfully assailed. The defendants contend that the patent is invalid and that the survey is incorrect.

In support of their position that the patent is invalid, they produce the decision of Commissioner Drummond, of the general land office, made in June, 1872, directing a cancellation of the patent, and the decision of the Secretary of the Interior, affirming his action. They also produce an endorsement of that commissioner upon the patent, declaring its concellation. The endorsement refers to the decisions, and is dated on the 10th of April, 1873. Subsequently, on the 23d of the same month, this cancellation was revoked by order of the Secretary of the Interior, and the revocation is also endorsed upon the patent. The secretary states, in his communication to the commissioner, that the revocation was directed to enable the claimant to appear in court, and correct what he asserts to have been an error committed against his rights, and not for the purpose of revoking or altering the decision made. In connection with these documents, which were admitted subject to the objection of the plaintiff, the defendants produce another patent to the same parties, issued in June, 1866, which is referred to in the decision of Commissioner Drummond, and this patent, they contend, is the only valid patent which could be issued of the premises confirmed under the Mexican grant, to Olivera and Arellanes, from whom the plaintiff deraigns his title. That grant was of a rancho or tract of land known by the name of Guadalupe. It was presented to the board of land commissioners in 1852, was confirmed by the board in 1853, and by the decree of the District Court of the United States in 1857. This decree became final by stipulation of the Attorney-General, abandoning an appeal taken from it to the Supreme Court of the United States.

In September, 1860, the claim thus confirmed was surveyed under instructions of the Surveyor-General for California, by his deputy, Terrell, and the survey and plat of the premises were approved byhim on the 29th of January, 1861. On the 31st of May following, that officer filed in his office a certificate to the effect that the rancho confirmed had been surveyed, and that the survey and plat were approved by him on the day mentioned; that he had, during the previous February and March, caused to be published once a week for four weeks, successively, in two newspapers, to-wit: the Santa Barbara Gazette, published in the county of Santa Barbara, and the Los Angeles Star, published in the city and county of Los Angeles, a notice that the land had been thus surveyed, and that the survey and plat had been approved by him, that the survey and plat were retained in his office during the four weeks, subject to inspection; and that no order for their return to the United States District Court had been served upon him. At the time the survey and plat thus mentioned were made, and this certificate was filed, J. W. Mandeville, Esq., was the Surveyor-General of California. On the 25th of May, 1863, nearly two years after this paper was filed, Edward F. Beale, Esq., who was the successor in office, as Surveyor-General, of Mandeville, transmitted to the commissioner of the general land office at Washington, a copy of the plat of the tract surveyed, with a certificate that he had caused the publication of notice that the survey of the tract had been made, in the Santa Barbara Gazette and Los Angeles Star, as stated in the certificate of his predecessor. The new Surveyor General evidently copied the language of his predecessor, and inadvertently ascribed to himself an act which could only have been done by that officer.

Upon the transcript of the proceedings for the confirmation of the claim and this certificate of Surveyor-General Beale, a patent was issued from the general land office to the confirmees of the grant, on the 30th of June, 1866, signed by the President, under the seal of the United States, and recorded in the proper records of the land office. This patent was in August, 1866, transmitted to the Surveyor-General of California, to be delivered to the parties entitled to its possession. Immediately upon receiving notice of its issue, John B. Ward, at the time the owner of the premises, and entitled to the patent, refused to aceept it, alleging that the survey of the premises did not conform to the decree of corfirmation, and was not final under the act of 1860, as the requirements of that act with respect to publication had not been complied with. Soon afterwards he presented to Commissioner Wilson, of the general land office certain documentary evidence to establish his allegations, accompanied with a petition that the patent might be recalled and a new survey ordered. What that documentary evidence was, and what facts it disclosed, we are not informed, except by the opinion of Commissioner Drummond, of June, 1872, annexed to the copy of the patent of 1870, produced by the plaintiff. This opinion was given in evidence by the defendants, as embracing the decision of that officer, and a statement of the reasons for directing a cancellation of that patent.

If the facts there stated can not be considered as facts in evidence, there is nothing before the court impairing the validity of the patent of 1870. The endorsements on the copy produced, show a revocation by the secretary of the cancellation directed by the commissioner; and if titles can be affected in this irregular way, can be divested and reinvested by endorsements of the officers of the land office upon its records, the revocation is of equal validity with the cancellation. The case, as thus presented, would be that of two patents to the same parties, the second covering a larger tract than the first, with the admission of counsel that the second was issued upon allegations by the owner, of error in the survey of the premises covered by the first, and of its insufficient publication under the act of 1860. Without other knowledge on the subject we could not say that the second patent was invalid. Cases may often occur where a second patent would be necessary to prevent gross wrong to the patentee. If, for instance, a confirmation and a survey embraced three distinct tracts, and by mistake the survey returned, and the patent issued covered only two

of them, we do not see why, upon a proper presentation of the fact, and application of the claimant, the commissioner might not issue a second patent, either for the omitted tract or one embracing the three tracts together. The administration of the land department would be very defective, if a mistake of this kind could not be remedied upon the consent of the parties before the acceptance of the patent had rendered the proceeding a closed transaction.

If, then, any consideration is to be had to the argument of counsel, that the second patent in the case was properly cancelled, because the first patent was conclusive of the rights of the parties, the facts stated in that opinion must be treated as in evidence; they were apparently so regarded by counsel on the argument, and for the present we shall so speak of them. That opinion shows among other things, that the evidence presented to Commissioner Wilson disclosed the fact that the Santa Barbara Gazette, in which the publication was made, was printed and published in the city of San Francisco, and not in the county of Santa Barbara. The evidence at least satisfied the commissioner that the publication was not made in conformity with the law of 1860, and also, that the survey was erroneous, The patent of 1866 was accordingly recalled by him, and a new survey ordered, under the act of 1864. Such survey was made in 1867, and duly advertised; and was forwarded by the Surveyor-General with his approval, to the commissioner. Upon this survey a new patent was on the 18th of March, 1870, issued to the same parties as the original patent, signed by the President under the seal of the United States and recorded in the proper records of the land office. This patent was then forwarded by the commissioner by mail to the Surveyor General of California, for delivery to the party entitled to its possession. Some days afterwards, and before its arrival in California, the commissioner telegraphed to the Surveyor-General to return the patent, and it was accordingly returned. It was stated on the argument, that some suggestions of fraud had been made to the commissioner which induced him to direct the return. An examination, by his direction, showed the suggestion to be without foundation. But two years afterwards, Commissioner Drummond the successor of Commissioner Wilson, undertook to review the latter's action, had nearly six years previously, in 1866, in directing the new survey, and his subsequent action in issuing a new patent, and held that such action was without authority and void; that the Terrell survey of 1861 was conclusive, and accordingly directed a cancellation of the second patent and in its place a delivery to the patentees of the recalled patent of 1866.

We are, therefore, required for the disposition of this case to consider the validity of the action of these officers. Previous to the act of June 14th, 1860, the Commissioner of the general land office exercised a general supervision and control of all executive duties relating to private claims to land and the issuing of patents therefor. Such authority was vested in him by the act of July 4th, 1836, reorganizing the general land office. It necessarily embraced the examination of all surveys of such private claims and their correction until made conformable with the right conferred upon the claimant by legislative act or judicial decree. The surveys of private land claims under Mexican grants in California, were thus subject to his control. He was invested with this necessary power to prevent the consequences to individuals, as well as to the public, of accident, inadvertence, irregularity or fraud.* His duty, in these cases, was to compel conformity in the survey made with the decree of confirmation, where that contained a description of the land sufficiently specific to guide the surveyor, but if it contained no such description, then to compel a survey in a compact form, so far as such compactness was consistent with the natural features of the country, and the previous selection of the confirmee as shown by his residence, cultivation, and sales. This authority of the Commissioner continues under the act of 1864. But by the act of 1860, and so long as that act was in force, his power in this respect was withdrawn.

That act established a system by which all surveys, when made pursuant to its requirments, and advertised in a certain way, became so far final as to leave to the Commissioner the simple ministerial duty of issuing a patent thereon. It provided that the surveyor-general when he had caused, in compliance with the 13th section of the act of 1851, a private land claim to be surveyed, and a plat thereof to be made, should give notice that the same had been done, and that the plat and survey were approved by him, by publication once a week for four weeks in two newspapers, one of which was to be in a paper "where the place of publication was nearest to the land," and the other in a paper published in San Francisco, if the land was situated in the northern district of California, aud in Los Angeles, if situated in the southern district. The act also provided that, until the expiration of the publication the survey and plat should be retained in the surveyor-general's office subject to inspection; that upon the application of any party whom the district court, or a judge therof, should deem to have such an interest in the survey and location of a land claim, as to make it just and proper that he should be allowed to intervene for its protection, or on motion of the United States, the district court should order the survey and plat to be returned into court for examination and adjudication; that when thus returned notice should be given by public advertisement, or in some other form prescribed by rule, to all parties interested, that objection had been made to the survey and location, and admonishing them to intervene for the protection of their interests; that such parties having intervened might take testimony and contest the survey and locaion, and that on hearing the allegations and proofs, the court should render its judgment approving the survey, if found to be accurate, or correcting or modifying it, or annulling it and ordering a new survey, if found to be erroneous, and generally to exercise control over the survey until it was made to conform to the decree of confirmation.

And the act then declared that when, after publication, as thus required, no application was made for an order to return the survey into court, or the application was refused, or if granted the court had approved the survey and location, or reformed or modified it and determined the true location of the claim, it should be the duty of the surveyor-general to transmit, without delay, the plat or survey of the claim to the general land office; and that the patent for the land, as surveyed, should *forthwith* be issued therefor; and that "the plat and survey so finally determined by publication, order, or decree," as the same might be, should "have the same effect and validity in law, as if a patent for said land so surveyed had been isssued by the United States. "It is plain, from this language, that it was the intention of Congress to withdraw from the commissioner the supervision and control of surveys subsequently made of private land claims under Mexican grants in California.

But there was still a duty resting upon that officer. To render the survey final, when not subjected to the judgment of the district court (which acquired jurisdiction by a return to it of the survey) it was necessary under the act, as already seen, that the publication required should be made. This was an essential prerequisite to is finality; nothing else could be substituted for it. And though in issuing a patent upon a survey when final, the commissioner had a mere ministerial duty to perform, there was this preliminary duty cast upon him to see that the necessary publication had been made. The certificate of the surveyor-general was evidence of this fact, but it was only *prima facie* evidence; unquestioned, it might be taken as conclusive; when questioned, the commissioner could go behind it. The documents, as already stated, presented to him, disclosed the fact that no publication of notice of the Terrell survey had been made in a paper published nearest the land. They allege that the Santa Barbara Gazette was, in January

*Castro v. Hendricks, 23 Howard, 443.

and February, 1861, published in the city of San Francisco, and not in the county of Santa Barbara, which is distant several hundred miles from that city. Of these documents one was an affidavit made by a person employed upon the Gazette,* and the other by a subscriber to the paper. Both of them were made upon personal knowledge, and were positive in their character. And yet an affidavit of the widow of one of the publishers of the paper, made four years afterwards, that the Santa Barbara Gazette, though printed in San Francisco between January and October, 1861, was sent as soon as printed to Santa Barbara for distribution, was considered by Commissioner Drummond, six years afterwards, sufficient to overthrow these allegations. This distribution constituted, according to his judgment in reversing the action of his predecessor, the publication of the paper in that county within the meaning of the act of Congress.

Assuming for the present that Commissioner Drummond possessed at the time authority to annul the action of his predecessor, if deemed erroneous, we do not agree with him in his conclusion as to the sufficiency of the publication. It was not alleged in the affidavit of the widow, and it could not be presumed from the mere heading of the paper, admitted to be printed elsewhere, that the entire issue was sent to Santa Barbara, though intended principally for circulation there. Certainly, a presumption of the kind was very slight ground upon which one public officer could undertake to set aside the deliberate act of his predecessor, had years before, upon which rights of property rested. The statute says that the notice must be published in a paper where the place of its publication is nearest the land, not where the place of its distribution is nearest. In one sense, a paper is published in every place where it is circulated, or its contents are made known. But it is not in that general sense that the language, "place of publication," in the statute is used. That language refers to that particular place where the paper is first issued, that is, given to the public for circulation. Nearly all the great dailies published in the city of New York are distributed is different parts of the country. Large packages of these are daily made up and immediately transmitted to California, where the packages are opened and the papers distributed. A large number of them in this mode, no doubt, find their way to the county of Santa Barbara; yet it would do violence to our apprehension of the term to say these papers are published in Santa Barbara, in the sense of the statute. No one so understands the term in ordinary parlance, and it is not used in the statute in any technical sense.

But there is disclosed in the opinion of Commissioner Drummond another fact, which makes it clear that no sufficient or legal publication was made, and that is, that the notice published omits the material statement required by the statute, that a survey and plant of the claim confirmed had been made and approved by the surveyor-general. All that is stated in the notice is that the surveyor-general had examined and approved of the rancho Guadalupe, confirmed to Olivera and others, and that the plats would be retained in his office, subject to inspection, for four weeks from the date of the publication.† A party might perhaps reasonably infer that reference was thus intended to some survey of the land but he would not be obliged to take notice from the statement that the surveyor-general had caused a survey and plat to be made, or had approved of one made by others under his directions.

The commissioner appears to have given controlling weight, in overruling the action of his predecessor, to the certificates of Surveyors-General Mandeville and Beale, and of a clerk of the United States District Court. The certificates were only *prima facie* evidence, and before the patent was issued, and afterwards, if the patent was properly recalled, the commissioner was at liberty to go behind them, and enquire whether notices had been in fact published as there stated. The certificate of Surveyor General Beale, as to the publication, was of matters not within his personal knowledge. And the same may be said of the cetificate of the clerk of so far as the acts of the surveyor general and his publications were concerned; as to them it was without any value whatever. The clerk can certify to copies of papers and orders in his office, also, perhaps, to the absence of papers and orders in particular cases, but that is the extent of his authority. His certificate would have been just as valuable as evidence had it related to the acts of the commissioner himself, and yet the commissioner twice refers to it as having some potentiality in the matter.

But aside from all considerations of this kind, the case can not be disposed of by any judgment we may form of the evidence which controlled Commissioner Wilson. We have commented upon that evidence because upon its supposed insufficiency Commissioner Drummond justified his attempted annulment of action of his predecessor and the cancellation of the second patent. If the patent of 1866 could be recalled at all, the sufficiency of that evidence is not a subject for consideration in this form of action, any more than the sufficiency of the evidence upon which any other step in the progress of the proceeding for a patent was taken. As we have already stated, it was the duty of the commissioner, upon receiving a survey transmitted to him as published, under the act of 1860, to examine into the regularity and sufficiency of the alleged publication. That was a matter submitted by the law to his determination; and that determination, whether correctly or erroneously made, was conclusive, unless reviewed and corrected on appeal by his superior, the secretary of the interior. The commissioner has undoubtedly a right within a reasonable period, upon proper application, to reconsider any matter perviously determined by him, but such right must be exercised before proceedings upon the original ruling have been taken and concluded. It would be a dangerous doctrine, creating great insecurity in titles, if the correctness of his action upon a matter over which he has jurisdiction could years afterwards be annulled by his successor, because of supposed errors of judgment, upon the sufficiency of evidence presented to him. And it would be without precedent and against principle for a court of law, in an action of ejectment upon the patent, to enquire collaterally into the sufficiency of such evidence to justify the action of the commissioner, and to submit that question to the determination of a jury. The patentee, if such a proceeding were premissible, would find his title established in one case and rejected in another, according to the varying judgment of different juries.

It becomes important, therefore, to determine when a patent of the United States for land takes effect, that is when it becomes operative as a conveyance and binding upon both parties; and under what circumstances it may be recalled after it has passed under the seal of the United States, and been recorded. Some confusion has arisen in the consideration of this subject from not distinguishing between acts which bind the government, and acts which bind the patentee. It has been assumed, rather than stated, both in judicial decisions and in the argument of counsel, that when the government is bound, the patentee is bound also, without reference to his assent on the subject; but nothing is farther from the fact. No one can be compelled by the government, any more than by an individual, to be a purchaser, or even to take a gift. No one can have property,

* NOTE.—And it appears from the affidavit on file in the general land office, a son of the editor.

† The certificate was as follows:

U. S. SURVEYOR GENERAL'S OFFICE,
SAN FRANCISCO, February 12, 1861.

In compliance with the first section of an Act of Congress, approved June 14, 1860, regarding surveys of private land claims, surveyed in pursuance of the thirteenth section of an Act entitled "An Act to ascertain and settle private land claims in the state of California," approved March 3d, 1851, have been examined and approved by me,

Name of Rancho,	*Confirmee,*
GUADALUPE.	DIEGO OLIVERA *et al.*

The plats will be retained in this office, subject to inspection, for four weeks from the date of this publication.

(Signed.) JAMES W. MANDEVILLE,
U. S. Surveyor-General.

with its burdens or advantages, thrust upon him without his assent. In order; therefore, that the patent of the government, like the deed of a private person, may take effect as a conveyance, so as to bind the party to whom it is executed, and transfer the title to him, it is essential that it should be accepted. As the possession of property is universally or nearly so, considered a benefit, the acceptance by the grantee of the conveyance transferring the title, where no personal obligation is imposed, whether the conveyance be a patent of the government or the deed of an individual, will always be presumed in the absence of express dissent, whenever the conveyance is placed in a condition for acceptance. There is in this respect no difference between the patent of the government and the deed of a private individual.

The question then, in all cases is, when is the conveyance in a condition for acceptance by the grantee? What act of the grantor is necessary to place the instrument in a condition for acceptance? When in that condition its operation is no longer subject to the control of the grantor; that then depends upon the grantee. The answer to the question is not difficult. If the instrument be the deed of a private individual it is in a condition for acceptance when the grantor has parted with its possession or the right to retain it, in order that it may be given to the grantee.* If the instrument be the deed of the government, that is its patent, it is in that condition when the last formalities required by law of the officers of the government are complied with. These formalities consist in passing the instrument under the seal of the United States, and in recording it in the records of the land office. By these acts, open and public declaration is made that so far as the general government is concerned, the title of the premises has been transferred to the grantee. The record stands in the place of the offer for delivery in the case of a private deed; the instrument is then in a condition for acceptance, and is thenceforth held for the grantee. And so the authorities are, that the grantee in such case takes by matter of record, the law deeming, as says Mr. Justice Story, speaking for the supreme court, "the grant of record of equal notoriety with an actual tradition of the land in the view of the vicinage."†

In case of a private deed, it is essential that the grantor should part with its possession or the right to retain it, for until then he may alter or destroy it. But not so with the government deed; with the close of the record, the power of the officers of the government over the instrument is gone. Whether it thereafter remain in the land office or be transmitted to a local officer for manual delivery to the patentee, its validity and operation are unaffected. Its acceptance by the grantee will then be conclusively presumed, unless immediately upon knowledge of its issue, his refusal to accept it is explicitly declared, and such refusal is commuicated to the land office.

But assuming the correctness of this doctrine in cases of ordinary transfers by the government of property by sale or gift, it is argued by counsel that it has no application to patents issued upon a confirmation of Mexican grants in California. The argument is, that the government, in dealing with claims to land under these grants, acts as a soverign over a subject within its exclusive jurisdiction; and that in the discharge of its treaty obligations, it has declared in what manner such claims shall be presented; by what officers their validity shall be tested and location determined, and by what document the result of the proceedings, when favorable to the claimant, shall be authenticated. The patent, it has declared, shall be issued by the commissioner when its tribunals have adjudged that the claim is valid, and its officers have correctly surveyed it. The claimant, say the counsel, cannot prevent the agents of the Government from performing the duties which the law has imposed upon them. He is as powerless to prevent the issue of the patent as he was to annul the survey or control the decree. The law commands the commissioner to issue the patent, and with the discharge of that duty the confirmee cannot interfere. No act of the latter can enlarge or abridge the commissioner's powers. And hence the efficacy of the patent in these cases does not depend upon the acceptance of the patentee.

The argument is plausible, but not sound; it proceeds upon the assumption that an acceptance of the patent must be by assent subsequent to its issue. But subsequent assent is not essential. A previous application for a patent is as persuasive evidence of its acceptance as any subsequent assent; that is, if the patent conforms to the application. Patents issued upon comfirmation of Mexican grants in California are of this character. To obtain them is the object of the proceedings instituted under the act of 1851; the claimant asks in effect that his claim may be recognized and confirmed by appropriate decree; that then a survey conforming to such decree may be made in the mode prescribed by law, and that a patent thereupon be issued to him. When a patent is thus issued it will take effect without reference to any subsequent action of the patentee. He has in advance, by his proceedings, signified his acceptance. But on the other hand, if the patent in such case be issued without a final survey, that is, one determined in the prescribed mode to be comformable to the decree, its acceptance cannot be conclusively presumed, from the fact that the patentee instituted the proceedings for the conformation of his claim. He asked what the law authorized him to have, and so far as the law is disregarded in the survey he stands free as to his acceptance of the result. He can in such case, by prompt expression of dissent, communicated to the proper department, prevent the patent becoming so far binding upon him as to preclude a re-examination of the survey as to the errors alleged.

Such was the case with the patent of 1866; it was issued upon the supposition that the survey had become final by proper publication. The owner of the patent insisted that no such publication had been made and that the survey was not therefore final and binding upon him, and was in fact erroneous, and on that ground refused at once to accept the patent, and asked for a new survey. The commissioner of the general land office was, upon this refusal and petition, at liberty to look again into the alleged finality of the survey, that is, into the sufficiency of the publication; for on no other ground than its insufficiency could he depart from the survey returned. The preceding was one between the patentees and the government, and if the patentees, before accepting the patent, consented that the regular officer of the Government might go behind the record and re-examine the matter which had been by law entrusted to him, and correct an error which had been committed by accident, inadvertence, or otherwise, we do not perceive how any third party can object, and assail the second patent on that ground. If the defendants, or other third parties, have superior rights to those of the patantees, they are no more affected by the correction of the error in the survey than they would have been had the error never been committed. And if they have no such superior rights they can not, upon any just principle of law or morals, contend that the error committed to the injury of the patentees or their successor in interest, shall be for ever irreversible. This is not a case where any doctrine of estoppel for alleged acts or conduct of the parties applies.

The proceeding is not in principle essentially different from the correction of a deed of a private person. If the deed is accepted when tendered, the transaction is closed; the title has passed, and any subsequent alteration of the instrument, or its destruction, can not affect the grantee's title. Bnt if not accepted when tendered, the deed may be corrected by the grantor, until it meets the views of the grantee. The only difference between the two cases arises from the fact that whilst the individual grantor is not restricted in his alterations, the officers of the government, acting under the law, can only, even by consent of the patentee, go beyond the record to correct an error committed to his injury in disregard of rights secured to him by the law. The Terrell survey not having become final, and the commissioner being satisfied

*Jackson v. Dunlap, 1 Johnson's Cases, 116; Jackson v. Phelps, 12 John 418; Jackson v. Bodle, 20 Id. 184; Church v. Gilman, 15 Wendell, 656 · Hulick v. Scoville, 4 Gilman, 559; Bullitt v. Taylor, 34 Miss. 741.

†Green v. Liter et al., 8 Cranch, 247.

that it was erroneous, a new survey was properly ordered, under the act of 1864, which was then alone applicable. It is conceded that the subsequent proceedings, including the issue of the patent of 1870, were in accordance with its provisions. Our conclusion is that the patent of 1866 was lawfully recalled, and that the patent of 1870 was properly issued, and is a valid instrument, binding both upon the government and the patentees and their successor in interest. After it was recorded, the officers of the government were powerless to change it or cancel it, without the consent of its owner. It was then his muniment of title, and he was entitled to its possession whenever demanded.

The grant, upon which the patent held by the defendants is founded, was of a rancho known as *La Punta de la Laguna*, adjoining the rancho Guadalupe. It was presented to the Board of Land Commissioners in 1852, was confirmed by that tribunal in 1854, and by the decree of the District Court of the United States in 1857. This decree, like that in the Guadalupe case, became final by stipulation of the attorney-general, abandoning an appeal taken from it to the Supreme Court of the United States. In September, 1860, the claim confirmed was surveyed, under instructions of the surveyor-general for California, by the same deputy who surveyed the Guadalupe rancho, and the survey and plat were approved, as in that case, on the 29th of January, 1861, and a similar certificate of publication of notices of the survey and plat, in the same papers, and for the same period, was filed by the surveyor-general, on the 31st of May, 1861. From some unexplained cause, the survey and plat do not appear to have been forwarded to the general land office, for a patent, until 1873; for the certificate of the original by the surveyor-general incorporated into the patent, is dated in July of that year. The patent, as already stated, was issued in October, 1873. Whatever defect existed in the publication of notices of the survey and plat, in the Santa Barbara Gazette, in the Guadalupe case, existed in this case. No objection, however, appears to have been taken before the general land office on that ground, and objections to the survey of that character were obviated by the acceptance of the patent. The demanded premises are covered by this patent. We have, then, the case of two patents regularly issued, each embracing the land in controversy. We must, therefore, look behind them, to the original grants, to ascertain which of them carried the better right to the premises. As already said, they adjoin each other; the eastern line of one is the western line of the other. If we can find this line, the difficulty is, of course, solved. The grant of the Guadalupe rancho only designates generally the location of the land, without giving any specific boundaries; but in April 1840, which was the month following its issue, possession was officially delivered to the grantee by the magistrate of the vicinage, a proceeding necessary under the law of Mexico, to a complete investiture of title, and called, in the language of the country, juridical possession. This proceeding involved a measurement of the land, and ts segregation from the public domain. A record of the proceeding showing the measurement and the boundaries established, was made, and a copy is produced in evidence.

The grant of the rancho *La Punta de la Laguna* describes the land granted as bounded by various designated ranchos. In January, 1845, juridical possession of these premises was also given to the grantees by a magistrate of the vicinage. A record of this proceeding was also preserved, and a copy is in evidence. These records were before the Land Commission, and the United States District Court when the grants were confirmed, and in the decrees of confirmation the boundaries there given are followed.

If, now, we look at the decree in the case of the rancho of *La Punta de la Laguna*, we find the dividing line between it and the rancho Guadalupe thus described: "Commencing on the top of the *Lomas de la Larga*, and running northerly over the plain, crossing the middle of the Laguna, the distance of ten thousand two hundred varas to the *Cachillo de Nipomi*, where two roads ascend, and where a stake was driven as a boundary." The different objects here stated have all been identified. The position of the top of the *Lomas de la Larga* is admitted to be at a live oak marked on the survey; the Laguna, of course, lies where it always did; and the point where the stake mentioned was driven has been shown. The line thus given is the one laid down in the new survey of the Guadalupe rancho, upon which the patent of 1870 was issued. We are satisfied that it is the true line. It would serve no useful purpose to go minutely into an examination of the evidence presented against this view. It is sufficient to observe that it has not created any serious doubt in our minds as to the correctness of this line. This conclusion disposes of the question of conflict of boundaries.

It is admitted that the defendants, except such as disclaimed, were in the possession of the premises in controversy at the commencement of the action; but there is no evidence of their possession at any previous period. There is, therefore, no basis laid for the recovery of any other than mere nominal damages; and none, accordingly, will be awarded.

The plaintiff must have judgment for the possession of that portion of the demanded premises which is covered by the patent of 1870, with one dollar damages.

Counsel for the plaintiff will, within ten days, prepare special findings in the case, and submit them to the court for settlement, upon notice to the counsel of the defendants; otherwise, a general finding will be filed.

Commercial Paper—Signature obtained by Fraud and Circumvention.

SIMS v. BICE.*

Supreme Court of Illinois, January Term, 1873.

Hon. SIDNEY BREESE, Chief Justice.
Hon. PINCKNEY H. WALKER, " ALFRED M. CRAIG, " JOHN SCHOLFIELD, " JOHN M. SCOTT, " BENJAMIN R. SHELDON, " WILLIAM K. MCALLISTER. } Associate Justices.

1. **Signature obtained by Fraud, Instrument Void as between the Parties.**—Where a party is induced to sign a promissory note, under the representation and belief that the same is an agreement appointing him agent for the sale of machines, and a statement of his ownership of propety, and he can not read writing readily, as between the parties it will be void, as having been executed through fraud and circumvention

2. ——. **Degree of Diligence required by Signor.**—Where a person executes a note he must be diligent, and use all the reasonable means to prevent a fraud being practiced apon him, or he will be liable to an innocent purchaser before maturity. He is not required to use every possible precaution, but only such as would be expected from men of ordinary prudence.

3. ——. **Diligence Required of Assignees—Notes vended by Patent Right Men.**—The assignee, equally with the maker of a note, is bound to use proper diligence; and when agents for the sale of patent rights and such matters, who are strangers, offer to sell promissory notes taken by them, a prudent man would have his suspicions aroused, and in such case the purchaser ought to protect himself by enquiring of the apparent maker.

4. ——. **Case in Judgment.**—Where the defendant was procured to sign what turned out to be a promissory note, under the assurance that he was signing an agreement respecting his agency to sell machinery, and of his pecuniary ability, he not being able to read writing readily, and the proof showed that he did not sign the same recklessly, but commenced to read the papers he signed, and was prevented by the restiveness of his team in the field where he was ploughing: *Held*, that a verdict finding that the execution of the note was procured through fraud and circumvention, in a suit by an assignee before maturity, was not against the preponderance of the evidence.

Appeal from the Circuit Court of Sangamon county; the Hon. John A. McClernand, Judge, presiding.

The note sued on in this case was procured of the defendant while he was plowing in his field with a pair of young mules. The agent

*From advance sheets of 67 Illinois Reports, received through the courtesy of the official Reporter, Hon. Norman L. Freeman.

pretended to give him the appointment of local agent to sell machines for the Kalamazoo Manufacturing Corporation. The other facts appear in the opinion.

Messrs. Collum & Zane, for the appellants.

Messrs. Stewart, Edwards & Brown, for the appellee.

Mr. Justice WALKER delivered the opinion of the court.

This was an action brought before a justice of the peace of Sangamon county, by appellants, on a promissory note, against appellee. A trial was had before the justice of the peace, who rendered judgment in favor of defendant, and plaintiffs appealed to the circuit court. A trial was had therein by the court and a jury, resulting in favor of defendant, and after overruling a motion for a new trial, judgment was rendered on the verdict, and the record is brought to this court and errors are assigned.

The defence below was that the note was obtained by fraud and circumvention, and the only question argued is whether the evidence sustains the verdict. On the one side is the note, and on the other is the evidence of appellee. He swears that he only intended to sign the agreement appointing him agent for the sale of the machine, and a statement of his ownership of his farm, and he believed he had only signed them; that after signing the agreement in duplicate the agent asked him as to his post-office address, how far he lived from Springfield, and as to how much land he owned; the answers to which he wrote on a paper double the size of the note, and asked him to sign the paper, that the company could see that he was responsible; that he signed that paper, supposing it was what it was represented. He stated he could read printed matter and writing with difficulty, and on the trial the bill of exceptions states that he read the note to the jury without difficulty. It, we think, clearly appears from the evidence that the note was executed under the belief that it was wholly a different instrument, and he was not incurring any liability by signing it, and, as between the parties, the case falls clearly within the provisions of the statute.

But it is urged that, as applicants are innocent holders before maturity, they should be protected, unless appellee observed a high degree of caution in executing the note; and that he failed to so act, and should be held liable for the payment of the money. This court has repeatedly held that when a person so executes a note, he must be diligent and use all reasonable means to prevent a fraud, or he will be liable to innocent purchasers before maturity. Of course he is not required to use every possible precaution, but must exercise that caution which would be expected from men of ordinary prudence.

It was said in Taylor v. Atchison, 54 Ill. 196, that the mere fact that a party can read will not prevent him from alleging, even against an assignee before maturity, that the note was executed by fraud and circumvention, but that he should use reasonable and ordinary precautions to avoid imposition; if able to read readily, he should examine the instrument, if not, he should have it read to him by some person present; that he could not act recklessly, disregarding all the usual precautions to learn the contents of the instrument; that the assignee, equally with the maker, is bound to use proper diligence; that when agents for the sale of patent rights and such matters, who are strangers, offer to sell promissory notes, a prudent man would have his suspicions aroused from that fact, and should protect himself by inquiry of the apparent maker. That case, in many of its features, is very similar to this and a judgment against the plaintiff was sustained. See Murry v. Beckwith, 48 Ill. 391.

In this case the evidence tended to show that appellee did not act recklessly, but, on the contrary, he commenced reading the papers, and his team becoming restive he was compelled to desist to keep them from running, and was thus prevented from reading further. Again, appellants were dealing with a stranger, and if they knew he was an agent selling such machinery, it was enough to arouse their suspicions. Both parties must exercise prudence, and either failing to do so, will render him liable. Whilst we might, had we been acting as jurors, have arrived at a different result, still the evidence tended strongly to sustain the verdict. The preponderance, we think, shows that appellee acted as prudent men usually do, and we cannot say that the evidence fails to sustain the verdict.

The judgment of the court below is affirmed.

JUDGMENT AFFIRMED.

NOTE.—Compare Shirts v. Overjohn, *ante*, 423, and cases there cited.

Commercial Law—Acceptance and Payment.

FIRST NATIONAL BANK OF DETROIT v. ELSEY G. BURKHAM *ET AL.**

Supreme Court of Michigan, October 5, 1875.

Hon. BENJAMIN F. GRAVES, Chief Justice.
" ISAAC MARSTON, } Associate Justices.
" JAMES V. CAMPBELL, }
" THOMAS M. COOLEY, }

Acceptance and Payment conclusive on Drawee.—After accepting and paying a bill, the drawee can not recover back the amount of it from the payee, on the ground that he had paid it under a mistake, as to the reliability of the drawer's security, which had proved to be fictitious.

Opinion by COOLEY, J.

This case is certainly novel and peculiar. The drawees seek to recover from the payees the amount of a bill which they have accepted and paid, and the genuineness of which is not disputed. The ground upon which they plant their right of recovery is, that they have paid under a mistake of fact. The mistake consisted in their security from the drawer of the bill being fictitious when they supposed it to be genuine and reliable.

Admitting this to be so, how does the fact concern the payees? Do they assume to guarantee the fairness of the dealings of the drawers, with the drawees, or the adequacy of any securities upon which the dealings are based? Not, certainly, in ordinary cases; the law merchant gives the payees the right to assume that any draft they receive and forward, if it is accepted and paid, is a draft which, from the state of the dealings between drawers and drawees, it is right and proper that the latter should pay as the principal party; and the presumption of law that such is the case is their complete protection if they received the bill in the ordinary course of business and for value.

What is peculiar in the present case is, that the security which was sent forward with the bill proved to be fictitious. It is said that the drawees relied upon this security and would not have paid the bill but for a belief that it was valid. It is in this that the mistake consists on which they rely for a recovery.

If a mistake regarding their security will authorize the drawees to recall the payment made to the payee, no reason is perceived why a mistake regarding the responsibility of the drawer, or regarding his honesty and integrity or anything else upon which they relied for protection in their dealings, should not justify the like action. If they suppose the drawer to be responsible when he is not, is not this as genuine a mistake of fact on their part as if they suppose a security to be good when it is fictitious?

But it is said the payees themselves relied upon the security when they discounted the bill and sent it forward for payment. This is doubtless true; but we do not perceive that this changes the case. A payee in every case in which a bill is discounted, relies and is compelled to rely upon such security as he has from the drawer until the bill is sent forward and paid or accepted. When that takes place, he is furnished with what to him is conclusive evidence that the drawer was authorized to draw the bill. He may have relied upon the drawer's responsibility, or he may have confided in his integrity, or in something else. It is immaterial what his reliance was; the law left the risk with him until payment or

*Reported for this journal by Henry A. Chaney, Esq., of Detroit, Mich.

acceptance took it off his shoulders. Then the risk, if any, passes to the drawee.

It is not claimed in this case that if the drawees had relied upon the responsibility of the drawer, and that had failed them, they would have had any ground of recovery against the payees. But we think it would be an exceedingly unsafe doctrine in commercial law, that one who has discounted a bill in good faith, and received in its payment the strongest possible assurance that it was drawn with proper authority, should afterwards hold the moneys subject to such a showing as the drawee might be able to make as to the influences operating upon his mind to induce him to make payment. The beauty and value of the rules governing commercial paper, consist in their perfect certainty and reliability; they would be worse than useless if the ultimate responsibility for such paper, as between payee and drawee, both acting in good faith, could be made to depend on the motives which influenced the latter to honor the paper.

The best view that can be taken of this case for the plaintiff below, is, that there was a mutual mistake of fact under which the bank discounted, and the drawees paid the bill. Conceding this, why should the drawees be allowed to transfer the loss to the bank? Usually, when one of two parties equally innocent must suffer, the law leaves the loss where it has chanced to fall; but in a case like this, if the law should assist either party on the ground of mutual mistake, it certainly should not be the drawees. This suit seeks to reverse the rule of commercial law, and transfer from the acceptor to the payee the responsibility which the former assumes by acceptance, and which the law leaves there.

So far we have assumed that the bank discounted the bill in good faith and for value. We think this not open to question on the facts. The amount was put to the credit of the drawer and drawn against. The previous transactions cannot affect this unquestionable fact.

On the main points, Robinson v. Raynolds, 2 Q. B. 196, and Thiedemann v. Goldsmidt, 1 DeGex., Fisher & Jones, 4, are in point and appear to us unanswerable. The judgment must be reversed with costs, and a new trial ordered.

Constitutionality of Occupation Tax.

THE TEXAS BANKING AND INSURANCE CO. v. THE STATE OF TEXAS.

Supreme Court of Texas, 1875.

Occupation Tax—Costitutionality Thereof.—April 22nd, 1871, the legislature of Texas passed nn act, levying a tax of $250 on every person or firm dealing in stocks or bills of exchange, in every city or town of five hundred inhabitants; also a tax of $50.00 on every such person or firm in every city or town of less than five thousand inhabitants. *Held*, that this law conforms to the requirements of the constitution, and is valid.

On the 23d of May, 1874, the state of Texas instituted suit against The Texas Banking and Insurance Company, a corporation having its principal office in the city of Galveston, and pursuing the business or occupation of dealing in stocks and bills of exchange, in the city of Galveston, a city containing more than five thousand inhabitants. The defendant corporation pursued its business or occupation in the city of Galveston continuously from October 1, 1872, to June 3, 1873. Plaintiff sued to recover of defendant the sum of one hundred and fifty-six dollars, with interest thereon from October 1, 1872, alleging said sum to be due plaintiff as an occupation tax imposed on the occupation of defendant, under an act entitled "an act to give effect to the several provisions of the constitution concerning taxes," approved April 22, 1871, and that the corporation tax imposed under said act upon every person or firm pursuing the aforesaid business or occupation, in a city containing more than five thousand inhabitants, is two hundred and fifty dollars per annum. Judgment was rendered July 7, 1874, against defendant for the sum of $171.50.

L. E. Trezevant Esq., for the appellant, urged, that the act wa unequal and not uniform in its operation, and therefore unconstitutional. He maintained that the number of a town's inhabitants should not determine the amount of tax an inhabitant of such town should pay; nor the fact of one's being a member of a firm, or of his doing business alone. He quoted from the state constitution, Section XIX, Article XII: "Taxation shall be equal and uniform throughout the state. All property shall be taxed in proportion to its value, to be ascertained as directed by law." The following are among his authorities: Cooley's Constitutional Limitations, p. 495; Blackwell, Tax Titles, p. 7; 2 Kent Com. 331; Toledo Bank v. Bond, 1 Ohio St. 699; Exchange Bank of Columbus v. Hines, 3 Ohio St. 1; Gilmore v. City of Sheboygan, 2 Black, 510; Att'y Gen. v. Win. Lake and Fox R. P. R. Co., 11 Wisc. 39; State v. Merch. Ins. Co., 12 La. Ann. 802; Police Jury v. Nogues, 11 La. Ann. 739; Crow v. State, 14 Mo. 238; Knowlton v. Supervisors Rock Co., 9 Wisc. 410; Mayor of Columbia v. Beasly, 1 Humph. 252; Oliver v. Washington Mills, 11 Allen 268; Sutton's Heirs v. Louisville, 5 Dana, 512.

Opinion of the court by MOORE, J.

It is insisted on behalf of appellant, that the judgment should be reversed, because the law by which the tax demanded of him is levied, violates Art. 12, Sec. 19, of the Constitution.

The first clause of this section of the constitution is in these words, viz.: "Taxation shall be equal and uniform throughout the state."

This, we agree with the appellant, is the dominant provision in the section, and must be observed and respected in the levy of all taxes for general purposes of revenue of either class referred to in the subsequent part of the section.

But, nevertheless, it must not be supposed that this uniformity and equality can be of perfect logical exactness and mathematical accuracy. Evidently, in many instances, approximate equality in apportioning its burden is all that from the nature of the tax it is possible to attain. If there is such equality and uniformity as conform to the standard provided in the constitution, or reasonably deducible from it, or such as comports with recognized precedents, and long and well established usage and judical sanction, it is all that can be required, though in abstract reasoning it may not be found in entire accord with a strictly literal and technical rule of uniformity, and may bear, to some extent, in individual instances, with unequal weight.

For example, the constitutional rule of equality and uniformity in respect to taxes on property is in proportion to its value, though in fact unquestionably it often operates unequally, and bears much heavier upon the owners of some kinds of property, than it does upon others. So also the constitutional rule for capitation taxes is that of individuality, without discrimination in respect to its burthen. It is likewise quite evident that the equality and uniformity which is required is not applicable to the different classes of taxes as a whole, but to each particular character of tax which the legislature may levy, must be applied to the rule of uniformity and equality applicable to its class. There can most assuredly be no standard of uniformity and equality applicable alike to an *ad valorem* and an occupation tax, or one per capita and such as may be levied on incomes.

The particular question for our determination in this case is, whether the law levying the occupation tax for which this suit is brought violates the constitutional requirement of equality and uniformity in a tax levied upon persons pursuing any occupation, trade, or profession. What rule of uniformity can be found strictly applicable to such a tax? Surely it is not that of a definite sum to be paid by every one upon whom it is levied. Scarcely none would be devised more unequal, or less uniform for the just and fair apportionment of its burthen among those upon whom it is levied.

A tax thus levied, which would be ruinous upon one occupation, would be the merest trifle on another. The same might also

be the result, if no discrimination could be made between parties engaged in the same general class of occupations. A just and reasonable discrimination in the levy would seem to approach nearer an equal and uniform apportionment of the burthen of the tax among those upon whom it is levied than any other.

As the constitution has laid down no rule upon which the uniformity and equality it requires is to be secured, it is the duty of the legislature to ascertain and determine how it may best be accomplished. It has not been made to appear to the court that it has failed to do so by the law levying occupation taxes. Unless it had, we can not say, the law is in violation of the constitution. It conforms, with but slight and not very material deviations, to long and uniform usage in the levy of taxes of this character under our former constitutions, containing the same restrictions as those which it is supposed to violate. And it is but reasonable to hold that these provisions were retained in the present constitution in view of their receiving the same practical construction as had been previously given them. There is no error in the judgment and it is affirmed. JUDGMENT AFFIRMED.

Conditional Sale — Pledge — Power of National Banks to take Pledges of Chattels.

PITTSBURG LOCOMITIVE AND CAR WORKS v. STATE NATIONAL BANK OF KEOKUK.

United States Circuit Court, District of Iowa, October Term, 1875.

Before Hon. JOHN F. DILLON, Circuit Judge.

1. **Unrecorded Lease of Chattel — Rights of a Pledgee as against the Owner.**—A locomotive was leased by the manufacturers to a railroad corporation in Iowa, by an instrument in writing not recorded, for a sum equal to its value, to be paid in nine months; otherwise the manufacturers were to have the right to re-possess the same. The lessee pledged the locomotive to a bank to secure a loan of money. *Held*, under § 1922 of the Iowa Code of 1873, which requires contracts for the conditional sale of chattels to be recorded in order to be valid against creditors and subsequent purchasers without notice, that the pledgee's right was superior to that of the manufacturers.

2. **Power of National Banks to take Pledges of Chattels as Security for Loans.**—A national bank may take a pledge of chattels as security for money lent.

Replevin for a locomotive engine. In July, 1873, the plaintiffs and the Miss. Valley & West. R. R. Co. (an Iowa and Missouri corporation) entered into a written contract, by the terms of which it "let" or leased to the railroad company the locomotive engine for nine months, for a sum equal to the value of the locomotive, one-fourth of which was paid at or near the date of the instrument, and the balance was to have been paid within the nine months. If paid, the plaintiff was to execute to the railroad company a bill of sale; if not paid, the plaintiff "was to re-possess and enjoy the engine as though the instrument had never been made."

The instrument contained a stipulation on the part of the railroad company, that the said locomotive engine should be taken to Keokuk, Iowa, by the railroad company, and there kept and used and not removed from the control of the railroad company without the consent of the plaintiff.

The engine was sent to the railroad company, and was received by it at a town on its line in Missouri. While there, to-wit, in September, 1873, said railroad company borrowed of the State National Bank of Keokuk $1,250, and pledged the engine to the bank as security, placing the same in the actual custody of a third person for the security of the bank. The bank had no notice of the plaintiff's lease or claim on the locomotive, and the plaintiff's lease was never recorded. The question in the case is whether the pledge to the bank gives it a right to hold the locomotive as security for its loan to the railroad company as against the plaintiff.

At the date of these transactions there was in force in the state of Iowa the following statute:

"No sale or contract or lease wherein the transfer of title or ownership of personal property is made to depend upon any condition, shall be valid against any creditor or purchaser of the vendee or lessee in actual possession obtained in pursuance thereof without notice, unless the same be in writing, executed by the vendor or lessor, acknowledged and recorded the same as chattel mortgages." Code 1873, section 1922.

Howell & Anderson, for the plaintiff; *Gilmore & Anderson*, for the bank.

DILLON, C. J., orally said:

1. Conceding that the instrument of lease was executed in Pennsylvania, and that as between the parties it does not show a sale of the engine, and that, aside from the Iowa statute (Code 1873, sec. 1922), the plaintiffs would have the superior right, I am of the opinion, in view of the express stipulation of the contract, that the locomotive was to be taken to Iowa and there used by the railroad company, that the Iowa statute controls the case and has the effect to subordinate the rights of the plaintiffs to the lien of the bank as pledge. 2. I am furthermore of the opinion that under the National Banking Act the bank had the right, on making a loan to the railroad company, to take a pledge of the locomotive as security. National banks are not, in my judgment, confined, in the taking of security for discounts and loans, to the security afforded by the names of indorsers or personal sureties, but may take a pledge of bonds, choses in action, bills of lading, or other personal chattels. The words "loans on personal security." in the banking act, are used in contra-distinction to real estate security. Such has been the usage of the banks, and any other construction would throw a bomb-shell into the community, and injure both the banks and their customers. JUDGMENT FOR DEFENDANT.

NOTE.—In Shoemaker v. Mechanics' National Bank, 2 Abbott (U. S.) 416, decided in the Maryland Circuit, it was held by Mr. District Judge Giles that a national bank has power to lend money on a note or other personal obligation secured by a pledge of stock of a corporation as collateral security.

Correspondence.

SOME OMISSIONS IN THE REPORT OF AMERICAN LIFE INS. CO. V. MAHONE, 21 WALL. 152.

EDITORS CENTRAL LAW JOURNAL:—Since the cases of Insurance Co. v. Wilkinson, 13 Wallace, 222, and American Life Ins. Co. v. Mahone, 21 Wallace, 152, have become the subject of discussion in your valuable journal, I deem it proper to submit the subjoined extract from my brief as counsel for the plaintiff in error in the latter case, upon the principal point in the case, in order to an appreciation, by the profession, of the merits of the decision. This appears to be proper, because the report of the case—as stated on p. 153, in relation to the circumstances of the answers of the insured in the "application," and of his "declaration" and warranty subjoined thereto—does not correctly state the facts shown in the record; the points made in the brief, and the authorities therein cited are entirely omitted by the reporter; and the opinion of the court is based mainly on the case of Insurance Co. v. Wilkinson, from which, it was contended for plaintiff in error, it was distinguishable in at least one essential respect, but which distinction does not appear to have received the notice of the court.

The statement of the reporter, p. 153, is not according to the record—that the answers of the insured, in his application, were "read over to him, who signed them, and *immediately afterwards signed a declaration*," which was, in effect, an agreement, that if the proposals, answers and declaration returned to the company should be found fraudulent or untrue in any respect, * * the policy shall be void. The record showed that, after the application and answers were signed by the applicant, it was handed back to him by the agent, and was *kept by him for several hours*, and, with the subjoined "declaration" signed by him, was then returned by him to the agent.

"I. The facts of the case, as proved by the agent, showed clealy a *warranty*, by the insured, of temperate habits.

The transaction consisted of—1st, his original answer, 'Yes,' to

question 5, as stated in the written proposal; 2d, his answer to question 16, that he had reviewed the answers as written, and *affirming his answers, as written*, including that to question 5; 3d, his accompanying "*declaration*," asserting the truth of that answer as written; 4, his subsequent delivery, and propounding to the company, of said answers and *declaration* as the basis of his application; 5th, his acceptance of the policy, *with the stipulation in it*, that it was issued by the company, and accepted by him, *on the faith that the answers and declaration, as stated*, were true and correct.

"A warranty is a stipulation forming a part of the contract as it has been completed; and is construed as a condition precedent which must be strictly complied with to the minutest detail, or else the contract is rendered void." Bliss on Life Ins. § 34; Angell on Ins., § 140; Campbell v. N. E. Life Co., 98 Mass. 381; Anderson v. Fitzgerald, 4 Ho. Lords Cas. 484.

"'When the representations of the insured'—says Mr. Justice Clifford—'are expressly referred to in the policy as forming a part of the contract, they will acquire the character of warranties, and invalidate the insurance, unless strictly complied with, whether they are, or are not material to the risk assumed by the insurer.' Eddy St. Iron Foundry v. Hampton Fire Ins. Co., 1 Clifford, 300; 8 Metcalf, 141; 5 Hill (N. Y.) 188; 6 Cushing, 42; Ib. 340; Bliss on Life Ins., § 57.

This warranty, as here proved, is the basis of the obligation of the company; and when adopted by the applicant, and by him propounded to, and accepted by the company, according to the terms appearing by the face of the papers, it conclusively binds him. Whether the answers and declaration were originally correct or not, he adopted and ratified them, as stated, and is forever concluded to say that the answers, as stated, are not his.

"II. In cases of warranty, the warranty is construed to mean precisely what it says. If clear and explicit in its terms, no evidence *aliunde* is admissible to contradict, control, restrain, vary, or extend it. Angell, § 142*a*; Phillips, § 754; Bliss, §§ 38, 43. When the language of a written contract is neither ambiguous, nor technical, parol evidence is not admissible to explain it, so as to establish a new term in it. Patridge v. Ins. Co., 15 Wallace, 573. If this be not true, no contract, however fully or solemnly made, is binding; the most deliberate admissions, made as the basis of it, may be denied, and a premium is allowed to fraud and imposture. 1 Greenl. Ev., § 208; Bliss, § 81.

Now this warranty—consisting mainly *of the acts of the applicant, done after the answer 5 was written down*—was made *to the company*, and was confessedly the basis of its action in issuing the policy. The agent (taking the application), was the mere *conduit* through whom the proposal to make it was communicated. He could not, and did not, make the contract, but merely *received the application to be forwarded to the company*, who, upon consideration of the proposals, *as stated*, made the contract, *expressly upon the faith and basis of the terms stated in the proposals submitted*, with the warranty attached. Vose v. Eagle Life and Health Co., 6 Cushing, 42; Angell on Ins., § 323; Bliss, § 81; Ib. 293.

"The agent's action in taking the original answer was merely preliminary, and ineffectual without the subsequent "declaration" ratifying it, and proposing the answers, as written, as the basis of the contract. Here there was no controversy that the subsequent delivery of the proposals, with the answer and "declaration," as written and signed by the applicant, was deliberately delivered by him to the company's agent, to be sent to the company as the proposal for insurance, after having had it in his possession ample time for examination after it was signed by him. The necessary effect and object of the testimony of Cox—the admission of which, over the company's objection, is the error assigned—were to *deny the warranty and to contradict its terms*, thus fully adopted and acted upon by the applicant, and proposed to the company by him as the terms of the contract. This was clearly incompetent. Admissions *on which others act*, especially if made for that purpose, are conclusive against the party making them. 1 Greenl. Ev., § 207. *And it makes no difference whether the thing admitted was true or false.* Ib. § 208. This rule is applied, in all its force, to representations on which policies of insurance are issued. Per Lord Mansfield, cited in Park on Ins. 4; and is pointedly stated by this court in Ins. Co. v. Wilkinson, 13 Wallace, 222–233, thus:—"Where one party has, by his representation or his conduct, induced the other party to the transaction to give him an advantage, which it would be against equity and good conscience for him to assert, he would not, in a court of justice, be permitted to avail himself of the advantage." The warranty here is fully within these rules. Plumb v. Cattaraugus Ins. Co. 18 N. Y. 392.

III. "The testimony of Cox here admitted, stands upon wholly different ground from that in Ins. Co. v. Wilkinson, 13 Wallace. The facts of this case clearly distinguish it from that in every essential respect.

1. "That was a case merely of *misrepresentation*; this is one of *warranty*. The distinction is essential. A *misrepresentation* is not introduced into the policy, and is not incorporated in the contract. But a *warranty* becomes such by being referred to in the policy, as the basis on which it is issued. Angell on Ins., § 147*a*; Arnould on Ins. 499. And a warranty is absolute *according to its terms*. Bliss, § 63.

2. "The false warranty here did not consist alone in the answer given to question 5, as to the applicant's temperate habits, but in the further facts that after that answer "yes" had been written, and was deliberately affirmed again in answer 16, the paper containing it was *delivered back by the company's agent to Dillard, the applicant, who kept it several hours*, and then handed it back to the agent with his signature subscribed to it, and also to the "declaration" subjoined to it *to be sent to the company for its action*; which "declaration" contained a positive reference to the answers as written in the application, and a distinct re-affirmation of their truth and correctness.

"It is no answer to this to say, that the answer "yes," complained of as untrue, was untruely written by the agent Yeizer, and was not really the answer given by Dillard; and that the company is bound for this wrongful act of its agent. For though it was conceded to have been incorrectly written down by the agent, yet all the subsequent acts of Dillard above mentioned, render that immaterial, and bind him to an adoption of the answer as written, as the warranty on which the policy was issued by the company. None of these acts of subsequent re-affirmance appear in the case in 13 Wall.; and that and the cases there cited are not in point, under the facts of this case.

"But it is held that, though the knowledge of the insurer relieves against the effect of a *false representation*, it does not relieve against a false *warranty*. "Per Strong, J., in State Mut. Ins. Co. v. Arthur, 30 Penn. State, 315, 331.

There is no pretense that any fraud or wrong was practiced upon Dillard in relation to the *acts done by him after the original answer was taken down*; to-wit, his answer to question 16; his "declaration" signed by him; his subsequent keeping of the proposal after the answer was written with his signature to it; his subsequent delivery of it to the agent to be forwarded; and his *acceptance of the policy containing the stipulation affirming the correctness of the answer as written*. These acts have all the forms of deliberate acts. In the absence of all fraud in obtaining them—which is not alleged, and is not to be presumed—the law gives them the character of deliberate acts. Chase v. Hamilton Fire Ins. Co., 20 N. Y. 52; Liberty Hall Association, 7 Gray, 261; Bliss, § 293.

"And it is well settled that if the applicant knows that the facts are incorrectly stated in his application made out by a company's agent, the company is not liable; for he is a party to the fraud. Smith v. Cash. Mut. Ins. Co., 24 Penn. 320; Vose v. Eagle Ins. Co., 6 Cushing, *supra*; Smith v. Empire Ins. Co., 25 Barbour,

497; Wilson v. Conway Ins. Co., 4 Rhode Island, 141; Plumb v. Cattaraugus Mut. Ins. Co., 18 N. Y. 392.

"These subsequent acts constitute the controlling features of this contract, and fix its character *as a warranty* of the truth of the answer 5—*which is conceded to have been false*, and which, therefore, according to the stipulation of the policy, rendered it void.

All that Cox's testimony tended to prove was, that the answer to question 5, *as written*, was not Dillard's answer *as given* by him, yet, if he afterwards acted upon it, and had it sent forward as the basis of his application, after time and means of examining it, and *accepted the policy issued* on the *faith of his "declaration" that it was true*, he is bound to its truth; and it is immaterial what his original answer really was.

"Under these facts proved, it was not competent to show that the answer as written, thus repeatedly re-affirmed and adopted, and proposed as the basis of the policy, was untruly written."

These positions distinguishing the case from that of Wilkinson, appear not to have received the notice of the court; and as no notice is taken of them in the reporter's statement of the argument, it appears to be proper that they should be brought to the attention of the profession, to enable them to estimate properly the value and force of the decision, with reference to the evidence in the record, and the positions of law assumed by counsel in argument.

A. H. HANDY.

JACKSON, MISS., October 1, 1875.

Book Notice.

HANOVER ON HORSES.—A practical treatise on the Law of Horses, embracing the Law of Bargain, Sale, and Warranty of Horses and other Live Stock; The Rule as to Unsoundness and Vice, and the Responsibility of the Proprietors of Livery, Auction, and Sale Stables, Innkeepers, Veterinary Surgeons, Farriers, Carriers, and the Law of Negligence in the Use of Horses; Including the Rule of the Road, and the Responsibility of Owners for Injuries Caused by Vicious and Unruly Animals. By M. D. HANOVER, of the Cincinnati bar. *Second Edition.* 1 Volume. 8vo. Price, bound in law sheep, $4.00. Cincinnati: Robert Clarke & Co. 1875.

The author states that in preparing a new edition of this work he has sought to make it still more valuable by a thorough revision of the former text, and by the addition of three new chapters on "Carriers of Horses, or other Live Stock," "Negligence in the Management of Horses and other Animals," including the "Rule of the Road," and the injuries by Horses and other Animals," and also by the citation of over five hundred new cases bearing on the questions involved. Also that he has endeavored to give a clear and detailed statement of the laws which should govern Keepers of Livery, Sale, and Auction Stables, Stock Raisers, Veterinary Surgeons, Carriers, and others, in their daily transactions, in the Sale, Warranty, Safe Keeping and Transportation of Horses and other Live Stock, and their varied legal responsibility, a proper understanding of which will constantly save them from annoyance, litigation and expense.

The horse is certainly a curious topic to select upon which to write a law book. There is very little law applicable to horses that is not applicable to other things. If, however, this work is intended as a manual for unprofessional men who have to do with horses, it may in their hands prove useful. We should suppose that it would also prove a useful manual for magistrates; and do not doubt that it will afford the practising lawyer an easy reference to a great many *points* which otherwise he might have difficulty in finding.

We said there is not much law relating to horses as horses, and yet when we come to run through this volume, we are astonished at the number of medico-legal questions with regard to this useful animal which are illustrated by judicial decisions. Thus, in discussing the elements of *unsoundness* in a horse, Mr. Hanover takes up alphabetically a long list of diseases and vices, beginning with *Asthma* and ending with *Yellows*, and in a great many cases the question whether a given disease or vice constitutes unsoundness is determined by the decisions of the courts. At the same time a great many of these rules as to unsoundness are supported by no authority, although we suppose the author must have drawn them from some work on the subject which he deemed respectable. It cites about 2,200 cases, and treats of Abrasions, Acceptance, Acts of Ownership, Accident, Agents, Animals Feræ Naturæ, Assent of Parties, Auctioneer, Bailee, Bidding at Auction, Bill of Parcels, Borrowing Horses, Breach of Warranty, Carriers of Horses, Catalogues at Auction Sales, Caveat Emptor, Concealment, Conditional Contract of Sale, Constructive Acceptance, Contract, Contributory Negligence, Damages, Defective Roads, Defects, Diseases, Dogs, Earnest, Expense of Keep, Farrier, Fraud, Gift, Hiring of Horses, Horses-Breakers, Inevitable Accident, Infants, Injuries by Horses or other Animals, Inn-keepers, Letter (Contract by), Livery Stable Keepers, Necessaries, Negligence in Driving, Notice, Parol Evidence, Parties, Patent Defects, Price, Puffing, Quality (Warranty of), Recovery of Stolen Horses, Rescission, Representations, Rule of the Road, Sale, Servant, Signature, Soundness, Statute of Frauds, Street Cars, Title, Traveller, Usage, Veterinary Surgeons, Vice, Visible Defects, and Warranty. It contains 465 pages of matter tolerably well printed, and we recommend it to horse and stock men generally.

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This, the sixth annual edition, a well-known and most useful work, contains about seventy-five more pages of matter than its predecessor. It is set solid in fine type, and in its 678 pages there is compressed probably as much matter as is contained in four ordinary volumes of reports. During the six years of its existence, in which it has grown from a small volume of 130 pages, it has succeeded in acquiring a standard reputation. We cheerfully bear testimony to its merits; and we speak this year after a somewhat familiar acquaintance; for during the past year we have been obliged, in our editorial labors, to keep a copy constantly on our desk for reference. It is obvious that a book of this character, which tells the time of holding every court of record in the United States; which gives the names of the judges of all the federal courts, and of all the state courts of last resort; which gives a synopsis of what are commonly known as the "collection laws" of the various states, and territories, and of Canada, compiled by able and trustworthy attorneys in those states and territories and provinces; which gives the names of several thousand responsible attorneys, recommended by banks, bankers, or leading merchants, in various parts of the United States and Canada; and which gives an extended list of banks and bankers, with the amount of their capital;—must be of great use as a book of reference to every practising lawyer.

From one circumstance, we infer that the list of attorneys is very carefully revised. We notice the names of a number of attorneys printed in italics with the remark at the foot of the page, "*We withdraw our former recommendation.*" We presume this has been done for cause. If it has not, it is a grievous wrong to the persons named. If it has, it must have required a good deal of honest courage to do it.

We do not "withdraw *our* former recommendation" of this book, but cordially recommend it to such of our readers as are not familiar with it.

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EDITORS CENTRAL LAW JOURNAL:—I have seen in some publication, during this year a notice of a case holding that where money, property, etc., is given in consideration of illicit intercourse, it can not be recovered back. Can you tell me where to find the case? Very respectfully, B.

We do not know of such a case; but we suppose that courts will not disturb *executed* contracts, because they were founded upon an immoral consideration.—[ED. C. L. J.

STATUTE OF LIMITATIONS—PRIORITY UNDER QUIT-CLAIM DEEDS.

CORSICANA, TEXAS, Oct. 16th, 1875.

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Summary of Our Legal Exchanges.

ADVANCE SHEETS OF 55 NEW HAMPSHIRE REPORTS.*

Executory Devise—"In Trust" as Description merely.—Tappan's appeal. Opinion by Foster, C. J. [55 N. H. 317.] 1. A testator disposed of his property by will as follows: "I give and devise to my executors hereinafter named—my brother W. T., and my son J. W. T.,—in trust, my present dwelling-house, situtate * * * for the sole use, improvement, and benefit of my son J. W. T. and his heirs, subject to the particular interest of a part of the same before given to my wife, S. T." S. T. having died, J. W. T. took possession of the premises, and after many

*Courtesy of John M. Shirley Esq., Andover, N. H., Reporter.

years died, having devised the same to his wife H. E. T. *Held*—the devise to W. T. and J. W. T., though without words of inheritance, passed a fee in the estate, which upon the death of the original testator vested immediately in J. W. T. by force of the statute of uses, said fee being qualified and incumbered, during the life-time of S. T., by her "particular interest" therein, and on the death of J. W. T. his wife took by devise from him, an absolute legal estate in fee simple. 2. The testator also bequeathed as follows: "I give to the said W. T. and J. W. T., in trust, the sum of ten thousand dollars, to be made permanent and secure by mortgages on real estate, or otherwise, as said trustees may consider most advisable; the interest of said sum to be disposed of by my said trustees in manner following, to-wit,—two hundred dollars to be paid annually to my wife, S. T., so long as she shall remain my widow, and no longer; the proceeds of the remainder of the interest of said sum to be paid to my son J. W. T. or his heirs, annually, or oftener, should it be considered advisable and necessary, during the natural life of my son J. W. T.; and at his decease, it is my will and intention to give the said sum of ten thousand dollars, in trust, to my grand-children, in equal proportions," etc. *Held*, on the death of the original testator this fund vested in his grand-children, subject only to the trust in favor of S. T. and J. W. T.; and on the death of S.T. and J.W. T. the fund did not revert to the estate of the original testator, but the said grand-children took an absolute title in the fund, discharged of all trusts. 3. The words "in trust," as used in the last line of the testator's bequest above recited, were construed as words of designation and description merely.

Contempt of Court—Evidence.—Bate's Case. Opinion by Ladd, J. [55 N. H. 325.] In general, proceedings for a contempt of court, not committed in the presence of the court, ought to be substantially according to the course of practice in criminal trials; and so, where evidence is introduced in such case beyond the answers of the respondent, it ought generally to be such as would be admissible on the trial of an indictment for the same offence.

Deed—Proviso applied to Grant—Writ of Entry under it.—Reed v. Hatch. Opinion by Foster, C. J. [55 N. H. 327.] 1. A. conveyed to B a piece of land on which a saw-mill was standing, and a right of flowage of A.'s adjoining land. Following the *habendum* clause in the deed, were the usual covenants in the ordinary form of warranty deeds. These were printed. After the covenants was inserted the following in writing: "provided said mill is kept for manufacture of lumber, or as long as it is kept for said use." After the last word in the printed covenants was a printed period. The next word, "provided," began with a small p, and not with a capital. *Held* that the proviso in the deed applied to the grant, and was not restricted to the covenant of warranty. 2. The mill was destroyed by fire. After the lapse of a year the grantor requested the grantee to erect a new mill on the premises, which the grantee neglected to do. After a reasonable time for such erection, the grantor brought a writ of entry to recover the premises. *Held*, that the erection within a reasonable time, and the maintenance of another mill similar to the mill destroyed, would have been a compliance with the terms of the condition or proviso of the deed; but the failure to erect and maintain such mill entitles the grantor to maintain his writ of entry.

Highway—Estoppel—Liability of City.—Gilbert v. Manchester. Opinion by Cushing, C. J. [55 N. H. 298.] Where the evidence tended to show that the city of Manchester had made a contract with the Amoskeag Manufacturing Company, a corporation, by which said corporation were bound to keep a certain street in good repair and permit the public to use it, and that the city during a continuous period of nearly thirty years, had held out said street as suitable for the accommodation of the public, and that the plaintiff, relying upon such holding out, had used the street as a highway and sustained damage by reason of its defective and insufficient condition—*Held*, that the city were estopped to deny that said street was a highway, for defects and insufficiencies in which they were liable, as in the case of other highways, under the statute (ch. 69, Gen. Stats.).

Negotiable Note—Days of Grace.—Fletcher v. Thompson. Opinion by Ladd, J. [55 N. H. 308.] An instrument in the following form,—"For value received, I promise to pay H. F., or order, twenty-five dollars in one year from date, for the rent of five rooms; and the said H. F. is to build a barn-yard fence; and the said P M. T. is to have all the land back of the house: [Signed] P. M. T,"—is not a negotiable promissory note, entitled to days of grace under the statute.

Trustee Process—Husband and Wife.—Clough v. Russell and Trustee. [55 N. H. 279.] The transfer by husband to wife of a note payable to him or order, in payment of a loan previously made to him by the wife from funds which she held as her own individual property under the statute, is a valid transaction, so that the maker can not afterwards be charged as the trustee of the husband on account of such note. It seems that a loan of her own money by a wife to her husband, in this state, may create a valid debt, for the recovery of which a right of action must exist in favor of the wife against the husband.

Heir estopped by Illegality of Ancestor's Contract.—Upton v. Haines. Opinion by Smith, J. [55 N. H. 283]. J. R. made and delivered his promissory note to H. & W. for $2,000, the consideration of which was an agreement by H. & W. with him that he should have for a term of years the sole and exclusive right to sell ale and beer manufactured by them in the city of M., and that the same should not be sold by any other person in said city. The note was signed by the wife of J. R as surety, and was secured by mortgage on real estate owned by her in her own right, and executed by her and her husband. R. and wife both died, leaving one son, J. R. Jr., a minor under the age of twenty-one years, who brought a bill in equity by S. U., his guardian, praying that the mortgage be set aside for illegality in the consideration of the note. *Held*—it being shown that the mother had knowledge or notice of the consideration of the note—that she became a party to an illegal contract, and, being *in pari delicto* with H. & W., she could not, if living, maintain such a bill, and that her heir-at-law stands in no better position.

Words Necessary to pass Immature Easement.—Spalding v. Abbot. Opinion by Smith, J. [55 N. H. 423]. A. conveyed to S. a tract of land with buildings thereon, supplied with water from a spring on land of H. by an aqueduct. In describing the premises conveyed, no mention was made of the aqueduct, or of any easement in the land of H. Following the description was the *habendum* in these words: "To have and to hold the said granted premises, with all the privileges and appurtenances to the same belonging." *Held*, that the word "appurtenances" in the *habendum* would not be construed to convey an easement in the land of H., which, not having ripened into a legal right, had not become legally attached to the premises conveyed.

By the use of the word "appurtenances" in the *habendum* of a deed, an easement will not pass unless legally appurtenant to the land in the hands of the grantor.

An assessment will not pass when not legally appurtenant to the land, unless the deed contain proper words describing it, and showing the intention of the grantor to pass it.

Mechanic's Lien against Bankrupt's Estate.—Marston v. Stickney. Opinion by Smith, J. [55 N. H. 383]. When a creditor has a lien on a building, or on the land whereon the building stands, for labor performed and materials furnished, and seeks to perfect his lien by a suit and attachment under the provisions of ch. 125, sec. 12, Gen. Stats, and the debtor is adjudged a bankrupt, unless his assignee shall proceed in the United States courts sitting in bankruptcy to ascertain the lien and provide for its satisfaction out of the property, the creditor will be entitled to enforce his lien by his suit in the state court. In such case, if the assignee, upon being served with an order of notice, neglect to appear and show cause why judgment should not be rendered against the property attached, the creditor, upon establishing his claim, will be entitled to judgment *in rem* against the property covered by his lien.

Collateral Impeachment of Fraudulent Judgment.—Gordon v. Gordon. Opinion by Ladd, J. [55 N. H. 399]. See Gordon v. Gordon, 54 N. H. 152. A decree of the probate court, granting license to an administrator to sell real estate, cannot be impeached collaterally for fraud, when the facts constituting the fraud charged were directly in issue and must have been determined by the probate court before the license could legally be granted;—therefore, upon a bill in equity brought to set aside such decree and the sale made in pursuance of it, the court refused to enquire whether the personal estate was sufficient to pay the debts, or whether it was necessary to sell the real estate for that purpose, the fraud charged consisting in the denial of those acts.

Disproof of Seizin.—Kenniston v. Hanniford. [56 N. H. 268.] To disprove the plaintiff's seizin, the defendant in a writ of entry may show title to the demanded premises in a third person.

Violation of Known Law Culpable.—Sullivan Co. v. Grafton Co. Opinion by Foster, C. J. [55 N. H. 339.] By Gen. Stats. ch. 75, sec. 9, it is made an offence to bring a "poor and indigent" person from a county in which such person has resided or been supported, into another county, the person effecting such removal knowing such person to be "poor and indigent." But the knowledge spoken of in the statute implies a culpable intent, since, in a legal sense, every violation of a known law is culpable.

"Children," when Word of Purchase—Equity.—Fales v. Currier. Opinion by Cushing, C. J. [55 N. H. 392.] 1. In a conveyance to an unmarried woman and her children, "children" is a word of purchase, and she takes a life estate with a remainder to her children. 2. Where such tenant for life and her assigns were committing waste, it was held that equity furnished the proper remedy for the persons in remainder.

497; Wilson v. Conway Ins. Co., 4 Rhode Island, 141; Plumb v Cattaraugus Mut. Ins. Co., 18 N. Y. 392.

"These subsequent acts constitute the controlling features of this contract, and fix its character *as a warranty* of the truth of the answer 5—*which is conceded to have been false*, and which, therefore, according to the stipulation of the policy, rendered it void.

All that Cox's testimony tended to prove was, that the answer to question 5, *as written*, was not Dillard's answer *as given* by him, yet, if he afterwards acted upon it, and had it sent forward as the basis of his application, after time and means of examining it, and *accepted the policy issued* on the *faith of his "declaration" that it was true*, he is bound to its truth; and it is immaterial what his original answer really was.

"Under these facts proved, it was not competent to show that the answer as written, thus repeatedly re-affirmed and adopted, and proposed as the basis of the policy, was untruly written."

These positions distinguishing the case from that of Wilkinson, appear not to have received the notice of the court; and as no notice is taken of them in the reporter's statement of the argument, it appears to be proper that they should be brought to the attention of the profession, to enable them to estimate properly the value and force of the decision, with reference to the evidence in the record, and the positions of law assumed by counsel in argument.

A. H. HANDY.

JACKSON, MISS., October 1, 1875.

Book Notice.

HANOVER ON HORSES.—A practical treatise on the Law of Horses, embracing the Law of Bargain, Sale, and Warranty of Horses and other Live Stock; The Rule as to Unsoundness and Vice, and the Responsibility of the Proprietors of Livery, Auction, and Sale Stables, Innkeepers, Veterinary Surgeons, Farriers, Carriers, and the Law of Negligence in the Use of Horses, Including the Rule of the Road, and the Responsibility of Owners for Injuries Caused by Vicious and Unruly Animals. By M. D. HANOVER, of the Cincinnati bar. *Second Edition.* 1 Volume. 8vo. Price, bound in law sheep, $4.00. Cincinnati: Robert Clarke & Co. 1875.

The author states that in preparing a new edition of this work he has sought to make it still more valuable by a thorough revision of the former text, and by the addition of three new chapters on "Carriers of Horses, or other Live Stock," "Negligence in the Management of Horses and other Animals," including the "Rule of the Road," and the injuries by Horses and other Animals," and also by the citation of over five hundred new cases bearing on the questions involved. Also that he has endeavored to give a clear and detailed statement of the laws which should govern Keepers of Livery, Sale, and Auction Stables, Stock Raisers, Veterinary Surgeons, Carriers, and others, in their daily transactions, in the Sale, Warranty, Safe Keeping and Transportation of Horses and other Live Stock, and their varied legal responsibility, a proper understanding of which will constantly save them from annoyance, litigation and expense.

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Negotiable Note—Days of Grace.—Fletcher v. Thompson. Opinion by Ladd, J. [55 N. H. 308.] An instrument in the following form,—"For value received, I promise to pay H. F., or order, twenty-five dollars in one year from date, for the rent of five rooms; and the said H. F. is to build a barn-yard fence; and the said P. M. T. is to have all the land back of the house: [Signed] P. M. T."—is not a negotiable promissory note, entitled to days of grace under the statute.

Trustee Process—Husband and Wife.—Clough v. Russell and Trustee. [55 N. H. 279.] The transfer by husband to wife of a note payable to him or order, in payment of a loan previously made to him by the wife from funds which she held as her own individual property under the statute, is a valid transaction, so that the maker can not afterwards be charged as the trustee of the husband on account of such note. It seems that a loan of her own money by a wife to her husband, in this state, may create a valid debt, for the recovery of which a right of action must exist in favor of the wife against the husband.

Heir estopped by Illegality of Ancestor's Contract.—Upton v. Haines. Opinion by Smith, J. [55 N. H. 283]. J. R. made and delivered his promissory note to H. & W. for $2,000, the consideration of which was an agreement by H. & W. with him that he should have for a term of years the sole and exclusive right to sell ale and beer manufactured by them in the city of M., and that the same should not be sold by any other person in said city. The note was signed by the wife of J. R as surety, and was secured by mortgage on real estate owned by her in her own right, and executed by her and her husband. R. and wife both died, leaving one son, J. R. Jr., a minor under the age of twenty-one years, who brought a bill in equity by S. U., his guardian, praying that the mortgage be set aside for illegality in the consideration of the note. *Held*—it being shown that the mother had knowledge or notice of the consideration of the note—that she became a party to an illegal contract, and, being *in pari delicto* with H. & W., she could not, if living, maintain such a bill, and that her heir-at-law stands in no better position.

Words Necessary to pass Immature Easement.—Spalding v. Abbot. Opinion by Smith, J. [55 N. H. 423]. A. conveyed to S. a tract of land with buildings thereon, supplied with water from a spring on land of H. by an aqueduct. In describing the premises conveyed, no mention was made of the aqueduct, or of any easement in the land of H. Following the description was the *habendum* in these words: "To have and to hold the said granted premises, with all the privileges and appurtenances to the same belonging." *Held*, that the word "appurtenances" in the *habendum* would not be construed to convey an easement in the land of H., which, not having ripened into a legal right, had not become legally attached to the premises conveyed.

By the use of the word "appurtenances" in the *habendum* of a deed, an easement will not pass unless legally appurtenant to the land in the hands of the grantor.

An assessment will not pass when not legally appurtenant to the land, unless the deed contain proper words describing it, and showing the intention of the grantor to pass it.

Mechanic's Lien against Bankrupt's Estate.—Marston v. Stickney. Opinion by Smith, J. [55 N. H. 383]. When a creditor has a lien on a building, or on the land whereon the building stands, for labor performed and materials furnished, and seeks to perfect his lien by a suit and attachment under the provisions of ch. 125, sec. 12, Gen. Stats., and the debtor is adjudged a bankrupt, unless his assignee shall proceed in the United States courts sitting in bankruptcy to ascertain the lien and provide for its satisfaction out of the property, the creditor will be entitled to enforce his lien by his suit in the state court. In such case, if the assignee, upon being served with an order of notice, neglect to appear and show cause why judgment should not be rendered against the property attached, the creditor, upon establishing his claim, will be entitled to judgment *in rem* against the property covered by his lien.

Collateral Impeachment of Fraudulent Judgment.—Gordon v. Gordon. Opinion by Ladd, J. [55 N. H. 399]. See Gordon v. Gordon, 54 N. H. 152. A decree of the probate court, granting license to an administrator to sell real estate, cannot be impeached collaterally for fraud, when the facts constituting the fraud charged were directly in issue and must have been determined by the probate court before the license could legally be granted;—therefore, upon a bill in equity brought to set aside such decree and the sale made in pursuance of it, the court refused to enquire whether the personal estate was sufficient to pay the debts, or whether it was necessary to sell the real estate for that purpose, the fraud charged consisting in the denial of those acts.

Disproof of Seizin.—Kenniston v. Hanniford. [56 N. H. 268.] To disprove the plaintiff's seizin, the defendant in a writ of entry may show title to the demanded premises in a third person.

Violation of Known Law Culpable.—Sullivan Co. v. Grafton Co. Opinion by Foster, C. J. [55 N. H. 339.] By Gen. Stats. ch. 75, sec. 9, it is made an offence to bring a "poor and indigent" person from a county in which such person has resided or been supported, into another county, the person effecting such removal knowing such person to be "poor and indigent." But the knowledge spoken of in the statute implies a culpable intent, since, in a legal sense, every violation of a known law is culpable.

"Children," when Word of Purchase—Equity.—Fales v. Currier. Opinion by Cushing, C. J. [55 N. H. 392.] 1. In a conveyance to an unmarried woman and her children, "children" is a word of purchase, and she takes a life estate with a remainder to her children. 2. Where such tenant for life and her assigns were committing waste, it was held that equity furnished the proper remedy for the persons in remainder.

LEGAL GAZETTE, OCTOBER 8.*

Foreign Attachment against Non-resident — Action by Assignee.—Guillon, Assignee, v. William Fontain, Circuit Court United States, Eastern District Pennsylvania. Opinion by McKennan, J. [7 Leg. Gaz. 321.] 1. Under the provisions of the act of June 5th, 1872, Revised Statutes, § 915, the federal courts may issue process of foreign attachment against the property of non-residents, where the same would lie under the laws of the state in which such court is held. 2. An action of debt, by the assignee of a bankrupt firm, against a special partner, upon his statutory liability under the laws of Pennsylvania, to restore the amount of his original capital, where the same has been reduced by the payment of interest or profits to him, may be commenced by process of foreign attachment.

Bankrupt Act—Distribution—Preference of U. S.—Partnership.—The United States v. E. M. Lewis *et al.* Circuit Court United States, Eastern District Pennsylvania. [7 Leg. Gaz. 324.] The firm of Jay Cooke, McCullough & Co., residing in London, were indebted in a large amount to the United States, which held (as was alleged) collateral security. A number of the members of the firm also composed the firm of Jay Cooke & Co, residing in this country, who were bankrupt. *Held*, that as members of the London partnership, the bankrupt partners were severally, as well as jointly, debtors to the UnitedStates, each being liable for the amount of the whole indebtedness; and that in the distribution of their property, the United States, under the act of March 3d, 1797, Revised Statutes, 3466, would be entitled to be first paid in full, out of their separate property, to the exclusion of private creditors. And this, without being first obliged to exhaust their rights in the securities pledged to them. *Held, further*, that the solvency or insolvency of the London firm could have no bearing upon this right to be first paid.

COMMERCIAL AND LEGAL REPORTER, OCTOBER 6.†

Fraudulent Representations of Insurance Agent — Parties—Pleading.—Nathan Martin v. Etna Life Ins. Co. In the Supreme Court of Tennessee. [Com. Leg. Rep. vol. 7 No. 32.] Opinion by Nicholson, C. J. 1. Where it appeared that the insured were induced to enter into the insurance contracts in consequence of the positive representation of the agent as to the future profits of the company, and the consequent advantages to the insured as an investment, in the different modes of payment presented; and where on surrendering their policies the agent, instead of giving them paid-up participating policies as promised, delivered to them simple paid-up policies, which latter the insured refused to accept; *held*, that as the original contracts of insurance were procured by fraudulent representations, the same were void *ab initio*, and the complainants have a right to have them so declared, and to have a decree for the money paid by them respectively. 2. As the money paid by the insured never became the property of the insurance company, in consequence of the fraud, the several benficiaries for whose benefit the investment was sought to be made acquired no interest in the policies, and therefore are not proper or necessary parties. 3. As the answers of the company and the agent were not on oath, their denials of the allegations of fraudulent misrepresentations, and as to the acceptance by the insured of the paid-up policies, only make up an issue.

Bankruptcy—Debt created by Fraud—Judgment—Merger—Agreement not to Arrest.—Varner v. Cron Khite. United States Circuit Court, Eastern District of Wisconsin. Opinion by Dyer, J. 1. Debt created by fraud is not discharged in bankruptcy, even though reduced to a simple judgment for money in which there is no mention of fraud; if the orignal action was based upon fraud, the fraud is not merged in the judgment. 2. A stipulation between the parties, after the judgment, by which the plaintiff waived his right to execution against the body of defendant, does not affect this question of discharge. 3. Massachusetts insolvent law, and many cases, commented on and distinguished.

*Philadelphia: King & Baird.
†Nashville, Tenn.: James Browne.

Legal News and Notes.

—THE ALLAIRE WILL CASE, which began its course in 1858 in the New York and New Jersey courts, has at last come to rest, by a decision recently rendered. The testator, Mr. T. J. Allaire, was a well known steam-engine builder.

—MR. JAMES A. WHITNEY, President of the New York Society of Practical Engineers, has recently delivered an address in favor of the perpetuation of patent laws. Printed copies may be obtained of the society, 212 Broadway, New York City.

—HON. ROBERT J. MCKINNEY, for some time before the war one of the judges of the Supreme Court of Tennessee, is dead. He was one of the ablest judges that court ever had. He was a clear thinker, a direct and forcible writer, and his strongest characteristics were a love of justice, hatred of fraud, and courage to do what was right.

—THE Japanese government has promulgated a copyright law, by which the name and address of the author must be attached to every newspaper article and book. The author of a book is obliged to go through a most tedious process to obtain permission to publish it, and must send three printed copies and the retail price of six to the home office. That puts an end to anonymous writing in Japan.

—THE NORTH CAROLINA CONSTITUTIONAL CONVENTION adjourned *sine die* on the 11th inst., after a session of 31 working days. In the last few days of the session many important ordinances passed, amounting to a general emancipation of the legislature for the restrictions under which it has labored since 1868, and giving it larger powers. The public debt question was not interfered with, several ineffectual attempts being made to repudiate the special tax bonds.

—THE London Law Times says: "Some time ago an application was made to the vacation Chancery Judge, Vice-Chancellor Bacon, to discharge a solicitor out of custody, under the following circumstances: The solicitor in question has been imprisoned under an order of attachment from the court of chancery, issued in the ordinary course, but it was contended on behalf of the prisoner, that the arrest was illegal, he having been captured by the officer of the court (the sergeant-at mace) while actually within the precincts of the Mansion House Court. The Vice-Chancellor, after hearing counsel for the applicant, held that a solicitor is privileged from arrest *eundo et redeundo*, and accordingly ordered the solicitor to be discharged upon his undertaking to take no further proceedings in the matter."

—HARPER'S MONTHLY MAGAZINE gives the following as a literal transcript from the Equity Record of the District Court at Steilacoom, page 64. No comments are required:

"M. M. McCarver and Julia A. McCarver, plaintiffs, v. D. B. Hannah and Kate Hannah, defendants.

Henry G Strure, attorney and solicitor for plaintiffs. On this day, July 17th, 1874. at the solicitation of Frank Clark, of Steilacoom (G. M. Grainger, deputy-sheriff of Pierce county, being present), I filedthe above entitled bill in equity, and issued certified copies thereof, and summons to the defendants therein. And if I have done this thing in error, and by so doing lay again myself liable to an action for damages in the amount of one thousand dollars damages, may Heaven in its mercy raise the moral status of lawyers, and pardon me for having confidence in their integrity.

JOHN SALTOR, Clerk and Register."

—THE Law Times directs attention to the numerous changes in legal nomenclature which have been wrought in England by the judicature acts. These changes were a matter of obvious necessity, as in many cases the same, or nearly the same, persons, documents, or things have for many hundred years been called by different names in the different courts which have now become one. After the first of November next, there will be no such persons as attorney or proctors, both of which titles will be merged into the Chancery appellation of solicitor. *En revance*, a suit becomes an action. "Bill" and "declaration" alike disappear, and become "statement of claim," or "statement of complaint," for the draftsman of the bill did not appear to have quite made up his mind on this point. The Judicature Commission, if we remember right, recommended the continuance of the term "declaration." "Plea" and "answer" become "defence," "replication" becomes "reply." "Demurrer" and "motion for new trial" both stand their ground, but bills of exceptions, proceedings in error, pleas in abatement, and new assignments will have disappeared forever. "Motion for judgment" is quite a new term to the common lawyer of England, and the equity one will scarcely recognize in it the old "motion for decree." "Terms" will be called "sittings."—[*Albany Law Journal.*

—THE LAWYERS AND DOCTORS are generally on excellent terms and very charitable as to each other's mistakes, as well they may be; but there are exceptions to this as to all rules, as the following may serve to illustrate: A practicing lawyer named Stone and a Doctor Mason were rival candidates for the senate in Tennessee, and were stumping the district together. Dr. Mason was an advocate of law reform, and, as an argument in its favor, he referred to a certain case in which his competitor had been recently non-suited on some technical point.—"Now," said the doctor, "we need law reform, or else Mr. Stone is incompetent to bring a suit correctly." Mr. Stone, in reply, said: "The Doctor has the advantage of me; for, when I make a mistake in my practice, he has only to go to the records of the court to find it and to publish it to the world; but when he makes a mistake *in his practice*, he buries it six feet under ground." If his "fellow-citizens" had a due ap preciation of ready wit Mr. Stone became a senator.—[*Irish Law Times.*